Supreme Court, U.S.
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No. ____

In the

Supreme Court of the United States

JOHN DREBICK and JANE DOE DREBICK,
husband and wife, d/b/a DREBICK INVESTMENTS,

Petitioners,

v.

CITY OF OLYMPIA, a Washington code city,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Washington

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a local government avoid the "nexus" and "rough proportionality" tests of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), by imposing development exactions in the form of "impact" fees?

2. May a local government avoid the "nexus" and "rough proportionality" tests of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), by imposing development exactions by legislative enactment?

LIST OF ALL PARTIES

Petitioners: John Drebick and Jane Doe Drebick, husband and wife, d/b/a Drebick Investments.

Respondent: City of Olympia, a Washington Code city.

RULE 29.6 STATEMENT

Drebick Investments is a sole proprietorship, wholly owned by John Drebick and Jane Doe Drebick, husband and wife. Petitioner company has no parent company and no publicly held company owns 10% or more of Petitioner's stock.

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PETITION FOR WRIT OF CERTIORARI

John Drebick and Jane Doe Drebick, husband and wife, d/b/a Drebick Investments (Drebick) respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Washington.

OPINIONS BELOW

The opinion of the Supreme Court of Washington is reported at 126 P.3d 802 (Wash. 2006), Appendix (App.) A. The Washington Supreme Court's unreported order denying Drebick's petition for rehearing and modifying the opinion is reproduced as App. B. The opinion of the Court of Appeals of Washington, Division 2, is reported at 83 P.3d 443 (Wash. Ct. App. 2004), App. C. The Final Judgment, Findings of Fact and Conclusions of Law, and Letter Opinion of the superior court were not published, but are included in App. D. The Findings and Decision of the Hearing Examiner of the City of Olympia are reproduced as App. E.

JURISDICTION

The opinion of the Supreme Court of Washington was filed on January 19, 2006, and became final on April 13, 2006, upon entry of the Court's denial of the Petition for Reconsideration, App. F. This petition is timely under Supreme Court Rule 13. On June 20, Justice Kennedy granted Drebick's timely application to extend the time within which to file the petition to and including August 11, 2006. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "[N]or shall private property be taken for public use without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any state deprive any person of life, liberty, or property, without due process of law."

Revised Code of Washington, section 82.02.020, is set out in App. G.

Revised Code of Washington, section 82.02.050(3), is set out in App. H.

INTRODUCTION

The Washington Supreme Court ruled in this case that the Fifth Amendment to the Constitution does not prohibit the exaction of "impact" fees as a condition to the use of private property, even where the fees are not related to any impact that might be caused by the development.

Almost 20 years ago, this Court issued its landmark ruling in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). Government regulation in *Nollan* took the form of an exaction—the California Coastal Commission imposed a condition requiring the property owner to dedicate a strip of beach in order to obtain a permit to rebuild his house. *Id.* at 827-28. This Court held that there must be a close connection between the condition imposed on the use of land and the social evil that would otherwise be caused by the unregulated use of the owner's property. *Id.* at 837. Without such a connection,

a permit condition is "not a valid regulation of land use but 'an out-and-out plan of extortion.'" *Id.* (citations omitted).

Seven years later, in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), this Court defined how close a "fit" is required between the burdens imposed by a development exaction and the burdens created by a proposed development plan. Where a nexus is found, there must also be a "degree of connection between the exactions and the projected impact of the proposed development." *Id.* at 386. There must be rough proportionality—"some sort of individualized determination that the required dedication is related *both in nature and extent* to the impact of the proposed development." *Id.* at 391 (emphasis added).

This Court recently affirmed the viability of these Takings tests in the context of development exactions generally. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548 (2005) ("[W]e reaffirm that a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed . . . by alleging . . . a land-use exaction violating the standards set forth in *Nollan* and *Dolan*."). However, this clarification of Fifth Amendment regulatory takings law does not address the applicability of *Nollan* and *Dolan* to certain types of land-use exactions. Local governments and courts oftentimes limit the holdings of *Nollan* and *Dolan* to circumstances where exactions involve a dedication of land or a fee in lieu of dedication of land (versus impact fees) or where exactions are imposed individually (versus legislatively). Others apply the tests more broadly. This Court has not expressly endorsed either interpretation. *See Garneau v. City of Seattle*, 147 F.3d 802, 811 (9th Cir. 1998) ("[T]he Supreme Court has left unsettled the question whether *Dolan*'s rough proportionality test applies to legislative, as opposed to administrative exactions. Lower courts and commentators have also struggled to determine whether the test applies to fee exactions . . . ." (footnote omitted)).

STATEMENT OF THE CASE

In July, 1988, Drebick Investments sought approval from the City of Olympia to build a four-story, 54,698 square-foot office building near the City's boundary. App. at E-5. The City approved the proposal conditioned upon the payment of a transportation impact fee. *Id.* The fee, intended to improve City roads, was calculated according to the City's legislatively adopted fee schedule. *Id.* at E-8-E-14. The fee was not based on the direct impact of the Drebick office building on City roads; it was calculated by averaging the cumulative traffic-related impacts of all new expected commercial office space the City projected might be built over the next six years. *Id.* at E-13. Specifically, the total square footage of all new commercial office space likely to be built within the city's boundaries was divided into the cost of all road improvement projects that such space would necessitate within the city's boundaries. This calculation results in the average rate per square foot that each new office building must pay toward all of the City's road improvement projects, regardless of any particular building's traffic-related impacts. *Id.* at E-14. The impact fee required to be paid by Drebick totaled $132,328.98. *Id.* at E-13.

Drebick sought an adjustment from the Director of the Community Planning and Development Department, as permitted by City ordinance. App. at E-6. The Director rejected the request. *Id.* at E-7. Drebick then appealed to the Hearing Examiner of the City of Olympia. *Id.* at E-8. The hearing examiner noted a number of significant facts. First, Olympia's transportation impact fee (1) "does not depend on or vary with the location within the City of the development charged," *id.* at E-14, and (2) "does not depend on or take into account whether the development charged actually contributes any trips to any of the project groups on which the fee is based." *Id.* Additionally, under Olympia's method (3) "a transportation impact fee assessed a specific development may be based on the cost of projects to which that development will contribute no

traffic and which will not directly benefit that development," and (4) "a development contributing no traffic to any of the project groups on which the transportation impact fees are based would be charged the same impact fee as the same type and size development which did contribute traffic to those project groups." *Id.*

Drebick's appeal to the Hearing Examiner argued that the nexus and rough proportionality requirements of *Nollan* and *Dolan* apply to the impact fees assessed against its project. App. at E-46. The Hearing Examiner reversed the City of Olympia, *id.* at E-55, but did not reach the constitutional argument. *Id.* at E-46. Finding that the impact fee imposed on the Drebick project did not meet the statutory relationship and proportionality standards of Washington Revised Code section 82.02.050, the Hearing Examiner explained, it was not necessary to "decide whether *Nollan* and *Dolan* apply to impact fees." *Id.*

Both Drebick and the City of Olympia petitioned the Thurston County Superior Court for review of the Hearing Examiner's decision. App. at D-4-D-5.

A. The Trial Court Decision

The trial court reversed the Hearing Examiner's decision and reinstated the $132,328.98 impact fee. App. at D-2. Although Drebick again raised the constitutional issues of nexus and rough proportionality, the trial court did not reach the issue by determining that the fee is an excise tax, not a regulatory fee. *Id.* at D-6. The trial court acknowledged that if the fee were a regulatory fee, it must be reasonably related to the new development and must not exceed a proportionate share of the costs of system improvements that are reasonably related to the new development. *Id.* However, since the Court held that the "fee" actually is a tax, it could be assessed on a citywide system basis—proportionate and related to the City's

jurisdiction-wide need for new transportation improvements necessitated by new development. *Id.*

B. The Court of Appeals Decision

On appeal, Drebick relied on *Nollan* and *Dolan* to argue that the City could not impose a traffic impact fee without considering the traffic-related effects of the specific project. The City argued it did not have to consider the effects of Drebick's particular development because it was imposing a tax, not a fee. App. at C-3.

Finding this distinction immaterial, the Court of Appeals reversed the decision of the Superior Court, and sent the case back to the City to impose an impact fee that "shall not exceed the individualized impacts of Drebick's specific project." App. at C-4, C-23. The court reached its decision by analyzing both the legislative history of Washington Revised Code section 82.02.050(3) and the constitutionality of the statute. *Nollan* and *Dolan* "are the leading authorities on when it is constitutional to exact property by conditioning a permit." App. at C-15. " 'The ultimate goal is to show that the proposed condition or exaction . . . is reasonably related to all or part of an identified public problem that arises from . . . the development project.' " App. at C-18 (quoting *Burton v. Clark County*, 958 P.2d 343, 355 (Wash. Ct. App. 1998)).

The court concluded that *Dolan* applies to the exaction in this case, even though it "was money, not land, " App. at C-18, noting that if " 'the *Dolan* proportionality test does not apply, the government can exact conditions such as the one here with few limits.' " *Id.* at C-19 (quoting *Benchmark Land Co. v. City of Battle Ground*, 14 P.3d 172, 175 (Wash. Ct. App. 2000)).

C. The Washington Supreme Court Decision

The Washington Supreme Court reversed the Court of Appeals, and held that the City could base impact fees on area-wide infrastructure improvements without determining the

direct impact of a particular project. App. at A-1. The court's holding was based on its interpretation of the requirements of the local impact fee statutes (App. at A-8-A-11; App. at G and H), and on its refusal to apply the *Nollan* and *Dolan* standards to the exactions at issue (App. A-11-A-12).

The majority chastised the dissent for arguing that *Nollan* and *Dolan* apply to the fees in this case: "The dissent does not explain that neither *Nollan* nor *Dolan* concerned the imposition of impact fees but addressed instead the authority of a local government to condition development approved on a property owner's dedication of a portion of land for public use." App. at A-11-A-12. The majority cites *Ehrlich v. City of Culver City*, 911 P.2d 429, 444 (Cal.), *cert. denied*, 519 U.S. 929 (1996), for the proposition that *Nollan* and *Dolan* do not apply to legislatively prescribed development fees. *Id.* at A-12-A-13.

The dissent urged a constitutional construction of the local impact fee statutes. App. at A-33-A-37. Citing the Court of Appeals decision, the dissent noted that "the most important conclusion to be drawn from the legislative history is the legislature's deliberate use of the *identical* terms the United States Supreme Court used to describe the 'nexus' requirement of the Fifth Amendment: 'reasonably related to.'" App. at A-33. The majority, "defeats the *Nollan* and the Washington State Legislature's definition [of 'reasonably related']." App. at A-36.

REASONS FOR GRANTING THE WRIT

I

THERE IS A CONFLICT AMONG THE LOWER COURTS ABOUT WHETHER THE *NOLLAN* AND *DOLAN* STANDARDS APPLY TO MONETARY EXACTIONS

The Washington Supreme Court ruled that the Fifth Amendment's Takings Clause imposes no limits on the power of local government to exact money from property owners as a condition of exercising their constitutional right to use their property. The court admitted that this Court has not decided whether the nexus and rough proportionality tests in *Nollan* and *Dolan* apply to the type of fees at issue in this case—fees imposed to mitigate the direct impact of development. *City of Olympia v. Drebick*, 126 P.3d 802, 808 (Wash. 2006) (App. at A-12).

This Court has not decided the issues raised here, but this Court has addressed the constitutional standards that apply to development fees. In the early case of *Village of Norwood v. Baker*, 172 U.S. 269 (1898), this Court treated the taking of property in the form of fees the same as the taking of property in the form of land.

> In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation.

Id. at 279.

More recently, after granting certiorari in *Ehrlich v. City of Culver City*, 512 U.S. 1231 (1994), this Court vacated the judgment of a California court of appeal, and remanded the case for consideration under *Dolan v. City of Tigard*, 512 U.S. 374. The implication of the remand is that this Court approves of the application of the *Nollan* and *Dolan* standards to monetary exactions. *See* Stephen R. McCutcheon, Jr., *Lessened Protection for Property Rights—The Conjunctive Application of the* Agins v. City of Tiburon *Disjunctive Test*, 27 Pac. L.J. 1657, 1675 (1996) ("[T]he remand of *Ehrlich* intimates that the nexus and rough proportionality requirements . . . may be applicable to permits conditioned upon monetary exactions . . . ."); *see also* Matthew S. Watson, *The Scope of the Supreme Court's Heightened Scrutiny Takings Doctrine and Its Impact on Development Exactions*, 20 Whittier L. Rev. 181, 205 (1998) ("The *Ehrlich* remand seems to indicate the new exaction test refined in *Dolan* is just that—a new exaction test, not merely a new physical exaction test.").

The Washington Supreme Court's limitation of *Nollan* and *Dolan* to the exaction of real property ignores this Court's treatment of development fees, and directly conflicts with decisions of the California and Texas Supreme Courts. In *Ehrlich v. City of Culver City*, 911 P.2d at 444, the California Supreme Court upheld the application of *Nollan* and *Dolan* to fees imposed as a condition of development.[1] The owner of a private tennis club and recreational facility applied to the City of Culver City for an amendment to the general plan, a zoning change, and amendment of the specific plan to allow replacement of the tennis club and recreational facility with a condominium complex. *Ehrlich v. City of Culver City*, 15 Cal. App. 4th 1737, 1743 (1993), *vacated and remanded*, 512 U.S. 1231 (1994). The City approved the application conditioned

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[1] This California Supreme Court decision resulted from an appeal of the decision of the California Court of Appeal after remand from this Court.

upon the payment of certain monetary exactions, including a $280,000 fee to pay a portion of the cost of replacing the lost recreational facilities, and a $33,200 art in public places fee. *Id.* The California Supreme Court "reject[ed] the proposition that *Nollan* and *Dolan* are entirely without application to monetary exactions. When such exactions are imposed . . . on an individual and discretionary basis, we conclude that the heightened standard of judicial scrutiny of *Nollan* and *Dolan* is triggered." 911 P.2d at 444.

The Supreme Court of Texas, in a case involving the dedication of money for road improvements, found no reason to limit application of *Dolan* to a dedication of land. *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 635 (Tex. 2004). The Texas court did not "read *Dolan* even to hint that exactions should be analyzed differently than dedications in determining whether there has been a taking." *Id.*

The split of authority on this issue goes far beyond the states of Washington, California, and Texas. Courts in many other states have also weighed in on the issue with differing results.

1. Some Courts Agree with the Supreme Courts of California and Texas, Holding That *Nollan* and *Dolan* Apply to Fees

Ohio: Unlike the Washington Supreme Court, the Ohio Supreme Court explicitly adopted a test "based on the *Nollan* and *Dolan* cases." *Home Builders Association of Dayton and the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 356 (Ohio 2000) (*Beavercreek*). The Ohio court considered the constitutionality of an ordinance that established "a system of impact fees payable by developers of real estate to aid in the cost of new roadway projects." *Id.* at 353. Specifically, the court considered the developers' assertion that "the ordinance produced an illegal taking of property without just

compensation in violation of the United States and Ohio Constitutions." *Id.* at 354. Like *Nollan* and *Dolan*, the test adopted by the Ohio court for impact-fee ordinances applies a "middle level of scrutiny" that considers whether there is a "reasonable connection" between needs and projected growth and between expenditures and benefits. *Id.* at 355-56. *Cf. Dolan*, 512 U.S. at 390 (noting the "intermediate position" of many courts that required a municipality to show a "reasonable relationship" between the required dedication and the impact of the proposed development); *id.* at 391 (adopting that middle level of scrutiny as "the federal constitutional norm" but relabeling it "rough proportionality" to avoid confusion of terms).

Illinois: The Illinois Supreme Court applies a more exacting standard of scrutiny than that required by *Nollan* and *Dolan*. In *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E.2d 384 (Ill. 1995), the Home Builders Association argued that state enabling statutes and county ordinances imposing transportation impact fees on new development "violate the takings clauses of the fifth amendment of the United States Constitution and . . . the Illinois Constitution." *Id.* at 388. The Illinois Supreme Court relied on this Court's takings jurisprudence, including *Nollan* and *Dolan*, to establish the minimum level of protection due under the Takings Clause. *Id.* at 388-89. The court noted the variety of tests applied by courts in other states, and then applied a more exacting standard of scrutiny than is required by *Dolan*—the "specifically and uniquely attributable" standard it had developed earlier in *Pioneer Trust & Savings Bank v. Village of Mount Prospect*, 176 N.E.2d 799, 802 (Ill. 1961). *Northern Illinois Home Builders*, 649 N.E.2d at 389-90. Like *Dolan*, the "specifically and uniquely attributable" test requires that local government demonstrate proportionality—albeit a direct proportionality—between an exaction imposed on new

development and the specifically created need for additional traffic. *Id.* at 389-90. *See Dolan*, 512 U.S. at 389-90.

Oregon: In *Rogers Mach., Inc. v. Washington County*, 45 P.3d 966 (Or. Ct. App. 2002), *cert. denied*, 538 U.S. 906 (2003), a developer challenged the county's ordinance assessing traffic impact fees to fund improvements to city streets and arterials. The court noted that in *Clark v. City of Albany*, 904 P.2d 185 (Or. Ct. App. 1995), *review denied*, 912 P.2d 375 (Or. 1996), it extended *Dolan*'s heightened scrutiny to monetary exactions. *See Rogers Mach.*, 45 P.3d at 979-80 (citing *Clark*, 904 P.2d at 185). The court distinguished the monetary exaction in *Clark* from *Rogers Machinery,* noting that *Clark* dealt with "an ad hoc adjudicatory imposition of a monetary exaction, not a generally applicable and legislatively imposed development fee." *Rogers Mach.*, 45 P.3d at 980. In a later case, the high court of Oregon noted that "the question of under what circumstances the heightened scrutiny imposed by *Dolan* applies to exactions that are monetary in nature is a complex question and is not completely resolved." *Dudek v. Umatilla County*, 69 P.3d 751, 757 (Or. Ct. App. 2003).

2. Other States Only Apply *Nollan* and *Dolan* to Dedications of Land or Fees in Lieu of the Dedication of Land

New York: Like the Washington Supreme Court in *Drebick*, the high court of New York will only apply *Nollan* and *Dolan* to fees that are required in lieu of the dedication of property. In *Twin Lakes Dev. Corp. v. Town of Monroe*, 801 N.E.2d 821 (N.Y. 2003), *cert. denied*, 541 U.S. 974 (2004), a developer challenged the town's "in lieu of parkland" fees arguing that it violated *Dolan*'s rough proportionality test. The developer argued that the ordinance establishing a $1,500 per-lot fee for subdivisions of five or more lots, where parkland dedication would not be appropriate, was not based on an individual assessment of the recreational needs generated by the

subdivision plan and was not roughly proportional to those needs. *See id.* at 824. The court noted that both parties agreed the developer's challenge to the town's per-lot recreation fee was governed by *Dolan*'s rough proportionality test. *See id.* Applying *Dolan*'s rough proportionality analysis to the park fees, the court found that the town's legislative "findings" were sufficient and therefore no taking had occurred. *See id.* at 825. The court, shifting the burden from the town to the developer, found that the developer "failed to demonstrate that the Town's $1,500 per-lot fee constitute[d] a taking." *Id.* at 825.

In a more recent case, the court refused to extend *Nollan* and *Dolan* when the town conditioned approval of a site plan for a single-family home upon the landowner placing a conservation restriction on a portion of the property. *Smith v. Town of Mendon*, 822 N.E.2d 1214 (N.Y. 2004). In *Smith*, the court stated that both *Nollan* and *Dolan* apply only to cases where the government required an actual transfer of property. *Id.* at 1219. Although the court refused to extend *Nollan* and *Dolan* in this case, the court also noted that it did extend *Nollan* and *Dolan*'s standards to a fee imposed in lieu of a physical dedication in *Twin Lakes*. *See id.* ("Outside of these two narrow contexts, neither the Supreme Court nor this Court has classified more modest conditions on development permits as exactions.").

Colorado: In *Krupp v. Breckenridge Sanitation District*, 19 P.3d 687 (Colo. 2001), the Colorado Supreme Court refused to apply *Dolan*'s rough proportionality standard to a sanitation district fee imposed on a residential townhouse project. The court adopted a very narrow interpretation of *Nollan* and *Dolan* that limits application of the nexus and rough proportionality tests to a narrow set of cases involving property exactions and discretionary adjudicative determinations specific to one landowner and one parcel of land. *Id.* at 695-97.

Arizona: The Arizona Supreme Court upheld a water resources fee assessed on new development in *Home Builders Association of Central Arizona v. City of Scottsdale*, 930 P.2d 993 (Ariz.), *cert. denied*, 521 U.S. 1120 (1997). The court said that *Dolan* was not applicable because the reasonableness of the fee was not raised at the trial court, and even if it had been raised, this case is distinguishable from *Dolan.* Tigard demanded an exaction of property from Mrs. Dolan, whereas in this case, Scottsdale sought only a fee. *Id.* at 1000. But then the court noted that the *Dolan* standard of rough proportionality is applicable in Arizona law through the statutory reasonable relationship requirement. *Id.*

Kansas: *McCarthy v. City of Leawood*, 894 P.2d 836 (Kan. 1995), involved a challenge by property owners seeking to invalidate the city's ordinance imposing traffic impact fees. The court, with little explanation, upheld the impact fees and refused to apply *Dolan*'s rough proportionality test. *Id.* at 845. The court noted that *Dolan* involved the dedication of portions of property to the city. *Id.* "There is nothing in [*Dolan*], however, which would apply the same conclusion to Leawood's conditioning certain land uses on payment of a fee." *Id.* A "critical leap" would be required to apply *Dolan* to an exaction in the form of a fee. *Id.*

South Carolina: In *Sea Cabins on the Ocean IV Homeowners Ass'n, Inc. v. City of North Myrtle Beach*, 548 S.E.2d 595 (S.C. 2001), owners of a private fishing pier sued the city for a temporary regulatory taking of the pier. The Supreme Court of South Carolina cited this Court's decision in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), for the proposition that *Dolan*'s rough proportionality test applies only to physical exactions. 548 S.E.2d at 603 n.5. The South Carolina court noted that, prior to *Del Monte Dunes*, "there was considerable debate as to whether the *Nollan/Dolan* tests applied to more than regulations mandating physical exactions." *Id.* In fact, considerable debate remains today. In

City of Monterey v. Del Monte Dunes at Monterey, Ltd., this Court merely distinguished excessive exactions from the denial of development. *See City of Monterey v. Del Monte Dunes Monterey, Ltd.*, 526 U.S. at 702-03.

Maryland: *Waters Landing Ltd. P'ship v. Montgomery County*, 650 A.2d 712 (Md. 1994). The Montgomery County Council adopted a development impact "fee," which it later changed to a development impact "tax." *Id.* at 714. The developers argued that the tax was actually an assessment, and that the assessment was subject to *Dolan*. *Id.* at 723-24. The court disagreed. The court limited *Dolan* to its facts, explaining that the "development impact tax" at issue in the case was adopted by legislative enactment and did not require landowners to deed portions of their property to the County. *Id.* at 724.

The conflict among the state high courts is real and substantial and involves an important question of federal law. To resolve the conflict, this Court should grant this petition.

II

THE LOWER COURTS ARE SPLIT ON WHETHER *NOLLAN* AND *DOLAN* APPLY WHEN EXACTIONS ARE IMPOSED BY LEGISLATIVE ACTION

In *Trimen Development Co. v. King County*, 877 P.2d 187, 191 (1994), the Washington Supreme Court upheld an exaction in the form of an in lieu of dedication fee assessed pursuant to a King County Council ordinance. The court concluded that "the fees imposed in lieu of dedication were reasonably necessary as a direct result of Trimen's proposed development. *See Dolan v. Tigard* . . . ('rough proportionality' between required dedication and impact of proposed development)." *Id.* at 194 (citations omitted). Now, in *Drebick*, the Washington Supreme Court has concluded that the "rough proportionality"

standard of *Dolan* does not apply to legislatively enacted exactions. App. at A-12.

The Washington Supreme Court's decision in *Drebick* creates a direct conflict with that of the Texas Supreme Court in *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620. The facts of the *Town of Flower Mound* are similar to those in *Drebick*. In *Town of Flower Mound*, the town conditioned plat approval on the developer's agreement to construct and pay for improvements for an adjacent public street. *Id.* at 623-24. The developer argued that the exaction should be based on the relationship between the cost of the improvements to the adjacent public street and the impact of the subdivision on that roadway. *Id.* at 624, 626. The Town said that the development's true impact was far broader, and the appropriate exaction is calculated by apportioning the total cost of all roadway improvements among all new developments. *Id. at* 626. The Town also argued that the *Nollan/Dolan* rules do not apply to legislatively imposed exactions; they should only apply to exactions imposed on an ad hoc, individualized basis. *Id.* at 640.

The Texas Supreme Court was not convinced that "a workable distinction can always be drawn between actions denominated adjudicative and legislative" (*id.* at 641) and declined to adopt a bright-line adjudicative/legislative distinction (*id.* at 642). Although, the Texas court refused to expressly decide whether the *Dolan* standard should apply to *all* legislative exactions, it said "we can find no meaningful distinction between the condition imposed on Stafford and the conditions imposed on Dolan and the Nollans. All were based on general authority taking into account individual circumstances." *Id.* at 641.

A. Some Courts Join the Texas Supreme Court in Balancing the Benefits and Burdens of Regulation by Applying the *Nollan/Dolan* Tests to Legislatively Imposed Exactions

Ohio: In *Home Builders Association of Dayton and the Miami Valley v. City of Beavercreek*, 729 N.E.2d at 355-56, the Ohio Supreme Court applied a test based on *Nollan* and *Dolan* to legislatively imposed impact fees to aid in the cost of new roadway projects." *See* section I(1) above for a more detailed description of the case.

Illinois: The Illinois Supreme Court relied on this Court's takings jurisprudence, and applied *Nollan* and *Dolan* to a legislatively imposed transportation impact fee on new development. *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E.2d 387-88. This case is discussed more fully in section I(1) above.

First Circuit Court of Appeals: *City of Portsmouth v. Schlesinger*, 57 F.3d 12 (1st Cir. 1995), involved a challenge to a low-income housing fee imposed when the owner of the site of some low-income apartments sought permission to replace the apartments with new condominiums. *Id.* at 12-13. The developers negotiated with city authorities to obtain a zoning change, and those negotiations resulted in several draft ordinances. *Id.* at 13. The draft ordinance ultimately approved by the city planning board provided for a payment of an impact fee "designed to compensate the City for the impact upon it expected to result from the loss of low income housing." *Id.* at 12-13. The parties negotiated additional impact fees to be paid to the city by the developers in accordance with the terms of a promissory note. *Id.* at 13.

The challenge to the fees was burdened with a statute of limitations issue that dominated the opinion, but the court noted that undisputed facts showed that "no rational nexus existed between the amount of the Developers' . . . [fee] and any

burden imposed on the City due to the zoning change." *Id.* at 14. The court uses the term "rational nexus" as a *Dolan*-style assessment of the relationship between the amount of a fee and the burdens imposed on a municipality by the development. "The district court . . . went on to find factually that no rational nexus existed here as between the $2,500,000 payment sought by the City and any demonstrable burden to be borne by it due to the zoning change." *Id.* at 13.

United States District Court for the Eastern District of Virginia, decision affirmed by the Fourth Circuit Court of Appeals: In *National Association of Home Builders of United States v. Chesterfield County*, 907 F. Supp. 166, 167 (E.D. Va. 1995), *aff'd*, 92 F.3d 1180 (4th Cir. 1996) (unpublished), *cert. denied*, 519 U.S. 1056 (1997), the district court upheld a Chesterfield County Policy adopted to guide the county's acceptance of proffers allowed by an earlier-adopted ordinance. The money from the proffers was to be used to offset the increased cost of specific capital improvements necessitated by proposed residential developments. *Id.* at 168-69. The policy, applicable to all residential rezoning requests, established a method for calculating the maximum proffer that could be tendered with a rezoning application. *Id.* at 168.

The Home Builders asserted that, on its face, the proffer policy "violates the Fifth Amendment to the United States Constitution's prohibition on taking of property without just compensation." *Id.* at 167. The court upheld the policy because

> there is no reason apparent on the face of the Policy why the proffers required, if any, can not [be] determined in an "individualized" manner and fixed at an amount "roughly proportional" in "nature and extent to the impact of the proposed development" according to the test set out in *Dolan v. Tigard.*

Id. at 169.

B. Other Courts Agree with the Washington Supreme Court's Ruling in This Case, and Refuse to Apply *Nollan and Dolan* to Legislatively Imposed Exactions

Georgia: In *Parking Association of Georgia, Inc. v. City of Atlanta*, 450 S.E.2d 200 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995), the owners and managers of surface parking lots challenged the constitutionality of an ordinance requiring the addition of barrier curbs, landscaping areas, ground cover, and trees to existing lots in several zoning districts. The court said that plaintiffs' reliance on *Dolan* was misplaced because, unlike Mrs. Dolan, the plaintiffs were not required to deed portions of their property to the city and the required exaction was the result of a legislative determination affecting many landowners. *Id.* at 203.[2]

This Court denied certiorari. But Justices Thomas and O'Connor dissented "[b]ecause the petition poses a substantial federal question concerning regulatory takings and because there is confusion in the lower courts." *Parking Association of Georgia, Inc. v. City of Atlanta*, 515 U.S. at 1118 (Thomas, J., dissenting from denial of certiorari). The dissenting justices expressly questioned the wisdom of treating legislative enactments with special deference.

> It is hardly surprising that some courts have applied *Dollan*'s rough proportionality test even when considering a legislative enactment. It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the

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[2] Three Georgia Supreme Court justices dissented, urging application of a multi-factored "benefit-extraction" analysis based primarily on the *Nollan* "close nexus" and *Dolan* "rough proportionality" tests to determine whether an exaction is an expense that in fairness and justice should be paid for by the public as a whole. 450 S.E.2d at 204.

> taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. If Atlanta had seized several hundred homes in order to build a freeway, there would be no doubt that Atlanta had taken property. The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.

515 U.S. at 1117-18.

California: The California Supreme Court applies the *Nollan* and *Dolan* tests to monetary exactions imposed on an individual and discretionary basis (*Ehrlich v. City of Culver City*, 911 P.2d at 444), but will not apply the same standard to exactions imposed by generally applicable legislation. *See, e.g.*, *San Remo Hotel L.P. v. City and County of San Francisco*, 41 P.3d 87, 102-04 (Cal. 2002), and *Santa Monica Beach, Ltd. v. Superior Court of Los Angeles County*, 968 P.2d 993, 1001-02 (Cal.), *cert. denied*, 526 U.S. 1131 (1999). The court reasons that heightened scrutiny does not apply to exactions in the form of generally applicable development fees, because "the heightened risk of the 'extortionate' use of the police power to exact unconstitutional conditions is not present." *Ehrlich*, 911 P.2d at 444.

Colorado: In *Krupp v. Breckenridge Sanitation District*, 19 P.3d 687, the Colorado Supreme Court refused to apply *Dolan*'s rough proportionality standard to a sanitation district fee generally applicable to all new development within the district. *Id.* at 696. "One critical difference between a legislatively based fee and a specific, discretionary adjudicative determination is that the risk of leveraging or extortion on the part of the government is virtually nonexistent in a fee system." *Id.*

Oregon: In *Rogers Machinery, Inc. v. Washington County*, 45 P.3d at 967, 982, where a business challenged the constitutionality of a traffic impact fee assessed on a development pursuant to a county ordinance, the Oregon Court of Appeals determined that legislatively imposed and calculated development fees are not subject to *Dolan*. The court agreed with the California Supreme Court's contention in *Ehrlich* and *San Remo Hotel* that *Dolan* only applies "with the sort of governmental leveraging that can arise in case-by-case adjudicatory imposition of development conditions." *Id.* at 982. The court does apply *Dolan*'s standard of heightened scrutiny to legislatively authorized dedications of property. *Schultz v. City of Grants Pass*, 884 P.2d 569, 572-73 (Or. Ct. App. 1994). The contradiction between *Schultz* and *Rogers Machinery* was explained as follows: "[W]e appear to have suggested that there were significant discretionary aspects to the land use decision [in *Schultz*]." *Rogers Machinery*, 45 P.3d at 979.

Arizona: The Arizona Supreme Court upheld a water resources fee assessed on new development in *Home Builders Association of Central Arizona v. City of Scottsdale*, 930 P.2d 993. The court said that *Dolan* did not apply to the fee because the fee resulted from "a generally applicable *legislative* decision," which does not involve the same risk of regulatory leveraging that occurs when a landowner must bargain for approval of a particular use of land. *Id.* at 1000.

North Dakota: Burlington Northern Railroad Company challenged a requirement that it modify and maintain drains, bridges, and culverts to accommodate increased water flow resulting from drain improvements made by the Southeast Cass Water Resource District. *Southeast Cass Water Resource District v. Burlington Northern Railroad Company*, 527 N.W.2d 884, 885 (N.D. 1995). The Supreme Court of North Dakota distinguished the facts of *Dolan* by explaining that Burlington Northern's duty "arises not from a municipal 'adjudicative decision to condition,' but rather from an express

and general legislated duty under a constitutional reservation of police power over a corporation." *Id.* at 896.

More than a decade has passed since *Parking Association of Georgia* was decided, and the lower courts remain hopelessly divided on how to interpret the governing precedents and principles when faced with a takings challenge to legislatively imposed exactions. As noted in a 2003 decision of the Georgia Supreme Court, "no consensus has emerged in other courts on the issue of *Dolan*'s application to legislative determinations." *Greater Atlanta Homebuilders Association v. DeKalb County*, 588 S.E.2d 694, 701 (Ga. 2003) (Carley, J., dissenting). Only this Court can resolve the conflict in the state and lower federal courts.

III

WHETHER CONSTITUTIONAL TAKINGS STANDARDS APPLY BROADLY IN THE CONTEXT OF DEVELOPMENT EXACTIONS PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW

A. Excluding Fees and Legislatively Imposed Exactions from the Scrutiny of *Nollan* and *Dolan* Does Not Further the Purpose of the Takings Clause

The choice of lower courts to apply different constitutional tests based on the form of an exaction and whether it is imposed by legislative enactment or quasi-adjudicative administrative decision ignores the policy problems *Nollan* and *Dolan* were intended to resolve. The close nexus and rough proportionality tests formulated by those cases seek to prevent coercive and unfair government behavior when a property owner must obtain government's permission to use property in a particular way.

In *Armstrong v. United States*, 364 U.S. 40, 49 (1960), this Court explained that "[t]he Fifth Amendment's guarantee that

private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." The requirements of a nexus and rough proportionality provide a means to ensure that the purpose of the Fifth Amendment is fulfilled. *See, e.g.*, *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479 (N.Y. Ct. App. 1994), *cert denied*, 514 U.S. 1109 (1995) (The New York Court of Appeals noted that a rent stabilization ordinance transferred significant, distinctive, apartment ownership prerogatives to Lenox Hill Hospital without its having to endure the burdens and costs of ownership. *Id.* at 481. The court concluded that the ordinance failed the constitutional test because it created an "indeterminate and unjustifiable burden draped disproportionately on the particular owners' shoulders." *Id.* at 483.). *See also* James L. Huffman, *Colloquium on* Dolan: *The Takings Clause Doctrine of the Supreme Court and the Federal Circuit:* Dolan v. City of Tigard: *Another Step in the Right Direction*, 25 Envtl. L. 143, 150 (1995) ("The takings clause . . . protects against this majoritarian tyranny . . . by insisting that the costs imposed by government use or regulation of private property are borne by all to whom the benefits inure." *Id.* at 152.).

The use of arbitrary distinctions to apply a less exacting standard of review to fees and to legislatively imposed exactions can result in exactions unrelated to the impact of development, as demonstrated in this case. Indeed, local governments will prefer to utilize their legislative power to impose exactions if such exactions are not subject to the same exacting standard as applies to adjudicative exactions.

Legislatively imposed exactions have become an increasingly popular method of funding local projects. *See* Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 Wm. & Mary L. Rev. 1513

(2006) (The authors discussing the marked shift in local government financing from general revenue taxes to "nontax revenue-raising devices such as exactions." *Id.* at 1513. The authors argue in favor of extending the *Nollan/Dolan* standards to all local government exactions, "replacing the currently relevant distinctions between legislative and adjudicative exactions, and between land and monetary exactions." *Id.* at 1519.); Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth With Impact Fees*, 59 SMU L. Rev. 177, 256-57 (2006) (noting the increasing use of development impact fees, and the split regarding application of *Dolan*'s rough proportionality test to fees as opposed to possessory exactions).

The Takings Clause's substantive protection of private property rights is undermined by artificial distinctions between exactions: monetary impact fees and other monetary and nonmonetary exactions, and exactions imposed by legislative acts and those imposed by quasi-adjudicative acts.

B. The Risk of Government Extortion Is Heightened When Exactions Are Imposed Legislatively

In *Ehrlich*, the California Supreme Court opined that heightened scrutiny is not required when analyzing the constitutionality of legislatively formulated exactions, because "the heightened risk of the 'extortionate' use of the police power to exact unconstitutional conditions is not present." *Ehrlich*, 911 P.2d at 444. Other state courts followed suit. *See, e.g.*, *Rogers Machinery, Inc. v. Washington County*, 45 P.3d at 982; *Krupp v. Breckenridge Sanitation District*, 19 P.3d at 696; and *Home Builders Association of Central Arizona v. City of Scottsdale*, 930 P.2d at 1000.

The fact is that the risk of government extortion does not disappear when exactions are imposed by legislation of general applicability. *See* Inna Reznik, *The Distinction Between*

Legislative and Adjudicative Decisions in Dolan v. City of Tigard, 75 N.Y.U. L. Rev. 242, 251(2000) ("The extortion and inequitable economic burdens that local governments potentially impose on landowners through administrative processes can occur just as easily in the legislative context." *Id.* at 267.). Indeed, it is highly probable that grossly disproportionate exactions will result from broadly applicable, generalized exaction programs. Local legislative bodies acting in their legislative capacity may be more likely to use the police power to exact unconstitutional conditions than in the adjudicative setting. *See* Reznik, *supra*, at 270-72.

Parties to adjudicative proceedings have significant procedural rights that may enhance equal treatment for competing interests. Reznik, *supra*, at 273. But the only safeguard against legislatively imposed extortionate exactions is found in the political process. The California Supreme Court noted that

> [w]hile legislatively mandated fees do present some danger of improper leveraging, such generally applicable legislation is subject to the ordinary restraints of the democratic political process. A city council that charged extortionate fees for all property development, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition at the next election.

San Remo Hotel L.P. v. City and County of San Francisco, 41 P.3d at 105. *See Rogers Machinery v. Washington County*, 45 P.3d at 982, (citing with approval the quoted language).

While the democratic political process may protect against extortionate fees for all property development, it is doubtful that the political process would work as efficiently to remove government officials who impose extortionate fees on only some forms of property development. The cost of development exactions is invisible to the majority of voters, and developers

are subject to the kind of majoritarian oppression that effects seriously outnumbered groups. *See Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d at 641 ("[W]e think it entirely possible that the government could 'gang up' on particular groups to force extractions that a majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others."). *See* Reznik, *supra*, at 271-72; and William A. Fischel, *Utilitarian Balancing and Formalism in Takings*, 88 Colum. L. Rev. 1581, 1582 (1988).

C. A Takings Determination Based on the Nature of Government Action Does Not Afford Protection for Important Individual Rights

The Fifth Amendment itself does not distinguish between kinds of property that may be taken or the manner by which property is taken. U.S. Const. amend. V. Indeed, there is "little doctrinal basis beyond blind deference to legislative decisions to limit [the] application [of *Dolan*] only to administrative or quasi-judicial acts of government regulators." David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan, *and What State and Federal Courts Are Doing About It*, 28 Stetson L. Rev. 523, 567-68 (1999); *See* D.S. Pensley, *Real Cities, Ideal Cities: Proposing a Test of Intrinsic Fairness for Contested Development Exactions*, 91 Cornell L. Rev. 699, 704 (2006) ("[T]here is . . . no principled basis for giving greater deference to exactions imposed through legislative enactment than to those imposed through adjudication.").

Some courts and legal scholars conclude that *Nollan* and *Dolan* show this Court's intent to set out principles for all property and land use regulation matters. *See, e.g.*, *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d at 483, ("[T]he Supreme Court refrained from placing any limitations

or distinctions or classifications on the application of the 'essential nexus' test."); and Callies, *supra*, at 567 (The *Nollan* and *Dolan* decisions involved property dedications, but the nexus and proportionality rules are of more universal application.).

Significantly, both *Nollan* and *Dolan* involved a mixture of legislative and adjudicative government action.[3] In *Nollan*, this Court, responding to Justice Brennan's dissent, noted the Coastal Commission's "public announcement of its intention to condition the rebuilding of houses on the transfer of easements." 483 U.S. at 833 n.2. In other words, just as in the present case, the Coastal Commission's statewide exaction policy was applied on a uniform and consistent basis. The statutory requirement in *Dolan* that landowners contribute to transportation infrastructure was also generally applicable and was adopted through legislative action. *Dolan*, 512 U.S. at 378 (noting that the community development code "requires that new development facilitate this plan by dedicating land for pedestrian pathways").

The lower courts that adopt artificial distinctions between exactions create a roadmap for local governments to avoid constitutional takings standards: so long as local governments impose exactions in the form of fees and impose them by legislative acts, *Nollan* and *Dolan* do not apply. The vast majority of development exactions then are free from constitutional scrutiny, and property owners are deprived of important constitutional liberties. Takings law is turned on its head when, instead of looking at the effect of regulation on a property owner, the manner of government action dictates whether there is a taking.

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[3] The blending of legislative, administrative, and judicial functions is common in land use decisionmaking. *See* Reznik, *supra*, at 257-66.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED: August, 2006.

Respectfully submitted,

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Appendix A–1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CITY OF OLYMPIA, a Washington code city,	)	No. 75270-2
	)	En Banc
Petitioner,	)	
v.	)	Filed JAN 19 2006
JOHN DREBICK and JANE DOE DREBICK, husband and wife, d.b.a. DREBICK INVESTMENTS,	)	
Respondents.	)	

OWENS, J.—The City of Olympia (the City) seeks reversal of a Court of Appeals decision that invalidated the City's calculation of a transportation impact fee imposed on a commercial developer, Drebick Investments (Drebick). At issue is whether the City's impact fee ordinances comply with the impact fee statutes, RCW 82.02.050-.090, of the Growth Management Act (GMA), chapter 36.70A RCW. We hold that, contrary to the city hearing examiner's interpretation, the GMA impact fee statutes do not require local governments to calculate an impact fee by making individualized assessments of the new development's direct impact on each improvement planned in a service area. We reverse the decision of the Court of Appeals.

FACTS

In July 1998, Drebick sought approval from the City for construction of a four-story, 54,000-square-foot office building within the city limits. The City approved the proposal, subject to Drebick's payment of a transportation impact fee of $132,328.98, calculated according to the City's legislatively adopted fee schedule. *See* former Olympia Municipal Code (OMC) 15.06, 15.10, 15.14, 15.18 (1999). In February 1999, Drebick sought a fee adjustment by submitting an independent fee calculation, as permitted in former OMC 15.10.020, but two months later the City's director of community planning and development rejected Drebick's alternative calculations, concluding that they did not meet the requisite accuracy and reliability criteria of former OMC 15.10.020D.

Drebick appealed the director's decision to the city hearing examiner, and hearings were held on four days in May and June 2000. In November 2000, the hearing examiner reversed the City, and the City sought review in Thurston County Superior Court under the Land Use Petition Act (LUPA), chapter 36.70C RCW. The superior court reversed the hearing examiner's decision, and we then denied Drebick's request for direct review in this court. The Court of Appeals thereafter reversed the superior court and remanded the matter to the City for a recalculation of the impact fee. *City of Olympia v. Drebick*, 119 Wash.App. 774, 83 P.3d 443 (2004). We granted the City's petition for review.

ISSUE

In calculating the transportation impact fees imposed on the Drebick development, did the City comply with the statutory standards set forth in RCW 82.02.050-.090 for apportioning such fees?

ANALYSIS

Standard of Review. At issue are the hearing examiner's interpretation of the impact fee statutes, RCW 82.02.050-.090, and his conclusion of law that, in calculating the impact fees imposed on Drebick, the City failed to comply with the requirements of RCW 82.02.050(3).[1] In its LUPA petition, the City asserted that the hearing examiner's decision was "based on erroneous interpretations of law." Clerk's Papers (CP) at 10-11; *see* RCW 36.70C.130(1)(b) (providing relief where party establishes that "land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise"). This court reviews issues of statutory interpretation and claimed errors of law de novo. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wash.2d 1, 9, 43 P.3d 4 (2002); *Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Assocs.*, 151 Wash.2d 279, 290, 87 P.3d 1176 (2004).

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[1] Relying on *New Castle Investments v. City of LaCenter*, 98 Wash.App. 224, 989 P.2d 569 (1999), *review denied*, 140 Wash.2d 1019, 5 P.3d 9 (2000), the hearing examiner determined that the "impact fees must be deemed taxes," but he concluded that, even so, they "must still meet the relationship, proportionality and benefit requirements of RCW 82.02.050 et seq." Clerk's Papers (CP) at 42. Similarly, the Court of Appeals described "the [tax-fee] distinction" as "immaterial": "Given that RCW 82.02.020 bars *either* a tax *or* a fee '[e]xcept as provided in RCW 82.02.050 through 82.02.090,' the question here is not whether the City assessed a tax or fee, but whether the City complied with RCW 82.02.050 through RCW 82.02.090." *Drebick*, 119 Wash.App. at 778-79, 83 P.3d 443 (citing *New Castle*, 98 Wash.App. at 234, 236, 989 P.2d 569 (concluding that impact fees "resemble taxes" but declining to "hold that these fees are taxes")). We agree that merely labeling the GMA impact fees either taxes or regulatory fees will not be dispositive here. Our task is to interpret the relational standard prescribed in RCW 82.02.050(3) and to determine whether the City complied with that standard.

Principles of Statutory Interpretation. The aim of statutory interpretation is "to discern and implement the intent of the legislature." *State v. J.P.*, 149 Wash.2d 444, 450, 69 P.3d 318 (2003); *Campbell & Gwinn*, 146 Wash.2d at 9, 43 P.3d 4. A reviewing "court is required, whenever possible, to give effect to every word in a statute." *Dennis v. Dep't of Labor & Indus.*, 109 Wash.2d 467, 479, 745 P.2d 1295 (1987). Where the meaning of a provision is "plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Campbell & Gwinn*, 146 Wash.2d at 9-10, 43 P.3d 4. A provision's plain meaning may be ascertained by an "examination of the statute in which the provision at issue is found, as well as related statutes or other provisions of the same act in which the provision is found." *Id.* at 10, 43 P.3d 4 (citing, inter alia, *C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wash.2d 699, 708-09, 985 P.2d 262 (1999) (stating that "[r]elated statutory provisions are interpreted in relation to each other and all provisions harmonized")); *see also State v. Clausing*, 147 Wash.2d 620, 630, 56 P.3d 550 (2002) (Owens, J., dissenting) (noting that "[a]pplication of the statutory definitions to the terms of art in a statute is essential to discerning the plain meaning of the statute"). Only when the plain, unambiguous meaning cannot be derived through such an inquiry will it be "appropriate [for a reviewing court] to resort to aids to construction, including legislative history." *Campbell & Gwinn*, 146 Wash.2d at 12, 43 P.3d 4.

Impact Fees under the GMA. In 1990, the legislature enacted RCW 82.02.050-.090 as part of the GMA, authorizing local governments to condition the approval of development proposals on the payment of "impact fees" to defray a portion of the costs arising from "new growth and development." RCW 82.02.050(1)(a). The legislature expressly stated that its "intent" is "[t]o ensure . . . adequate facilities . . . to serve new growth and development; . . . [t]o promote orderly growth and development by establishing standards by which [local

governments] may require, by ordinance, that new growth and development pay a proportionate share of the cost of the new facilities needed to serve new growth and development; and . . . [t]o ensure that impact fees are imposed through established procedures and criteria so that specific developments do not pay arbitrary fees or duplicative fees for the same impact." *Id.* subsection (1)(a)-(c). Thus, by enacting the impact fee statutes, the legislature intended to enable towns, cities, and counties to plan for "new growth and development" and to recoup from developers a predictable share of the infrastructure costs attributable to the planned growth, with the qualification that the local government's "procedures and criteria" were to protect "specific developments" from impact fees that were "arbitrary" or that "duplicat[ed]" the amount paid for "the same impact."

Just as RCW 82.02.050(1)(a)-(c) distinguishes "specific developments" from, in general, "new growth and development," subsection (2) authorizes local governments to impose impact fees on particular "development activity" as a means of financing the "system improvements" planned to accommodate overall "new development" in a defined service area:

> Counties, cities, and towns that are required or choose to plan under RCW 36.70A.040 are authorized to impose impact fees on *development activity* as part of the financing for public facilities, provided that the financing for system improvements to serve *new development* must provide for a balance between impact fees and other sources of public funds and cannot rely solely on impact fees.

(Emphasis added.) The definition in RCW 82.02.090(1) leaves no doubt that "[d]evelopment activity" refers to the particular new development seeking approval: "'Development activity' means any construction or expansion of a building, structure, or use, any change in use of a building or structure, or any changes

in the use of land, that creates additional demand and need for public facilities." RCW 82.02.050(2) therefore authorizes local governments, planning under the GMA, to impose impact fees on individual developments to cover the increased demand for roads, parks, schools, or fire stations identified in the capital facilities plan for a designated service area.[2]

The legislature provided two overlapping definitions of "impact fees." First, setting forth three limitations on such fees, RCW 82.02.050(3) mandates that they

> (a) Shall only be imposed for system improvements that are reasonably related to *the new development;*
>
> (b) Shall not exceed a proportionate share of the costs of system improvements that are reasonably related to *the new development;* and
>
> (c) Shall be used for system improvements that will reasonably benefit *the new development.*

(Emphasis added.) Compressing (a)-(c), RCW 82.02.050(3) explains that impact fees "[s]hall only be imposed for [a proportionate share of the costs of] system improvements that are reasonably related to [and reasonably beneficial to] the new development." That, here, the statute speaks of "*the* new development," (emphasis added) as opposed to "new growth and development" or "new development" (as in the preceding

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[2] The term "[s]ystem improvements" denotes those "public facilities that are included in the capital facilities plan and are designed to provide service *to service areas within the community at large,* in contrast to project improvements." RCW 82.02.090(9) (emphasis added); *see* RCW 82.02.090(6) (defining "[p]roject improvements" as "site improvements . . . planned and designed to provide service for a particular development project"); RCW 82.02.090(7) (defining "[p]ublic facilities" as, generally, roads, parks, schools, and fire stations).

section .050(1) and (2)), indicates that "*the* new development" is synonymous with the "development activity"—that is, with *the particular* new development seeking approval. *See Cowiche Growers, Inc. v. Bates*, 10 Wash.2d 585, 618, 117 P.2d 624 (1941) (Simpson, J., dissenting) (noting that the use of the definite article has a "'specifying or particularizing effect'" (quoting 1 WORDS AND PHRASES 1 (perm.ed., n.d.))); *Dennis*, 109 Wash.2d at 479, 745 P.2d 1295 (requiring courts "to give effect to every word in a statute").

The definition of impact fees in RCW 82.02.090(3) echoes the criteria set forth in 82.02.050(3)(a)-(c) and establishes that the phrase "the new development" means the individual development seeking approval: "'Impact fee' means a payment of money imposed upon development as a condition of development approval to pay for public facilities needed to serve new growth and development, and that is reasonably related to *the new development that creates additional demand and need for public facilities,* that is a proportionate share of the cost of the public facilities, and that is used for facilities that reasonably benefit *the new development.*" (Emphasis added.) Requiring that the impact fee be "reasonably related to the new development that creates additional demand and need for public facilities," the RCW 82.02.090(3) definition grafts onto "the new development" the definition of "development activity" (a term indisputably denoting the particular development); the legislature thus identified "the new development" as the individual development seeking approval. Moreover, the refund provision plainly equates the beneficiary of the system improvements with the particular new development seeking approval; RCW 82.02.080(1) refers to the local government's six-year window for spending the impact fees "on public facilities *intended to benefit the development activity for which the impact fees were paid.*" (Emphasis added.) In sum, we conclude that, in RCW 82.02.050(3) and 82.02.090(3), the legislature unambiguously provided that the impact fees were

to be a "proportionate share" of the costs of "system improvements" (that is, roads, parks, schools, or fire stations identified in the capital facilities plan) that are "reasonably related to" and "reasonably benefit" the particular development seeking approval.[3]

The question, then, is what the legislature intended when it required that the facilities funded by impact fees be *reasonably related and beneficial to* the particular development seeking approval. To discern the legislature's intended meaning, we must turn, in the first instance, to "related statutes or other provisions of the same act." *Campbell & Gwinn*, 146 Wash.2d at 10, 43 P.3d 4. The legislature declared at the outset its aim of "establishing standards" by which local governments could impose impact fees. RCW 82.02.050(1)(b). Those standards, most of which are spelled out in RCW 82.02.060, presumably enable local governments to arrive at fees that satisfy the criteria of RCW 82.02.050(3). The primary standard prescribed by the legislature is the local government's creation of a fee schedule: "The local ordinance by which impact fees

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[3] In contrast to this analysis, the Court of Appeals decision rests on the unpersuasive view that RCW 82.02.050(3) is "ambiguous in at least two ways." 119 Wash.App. at 780, 83 P.3d 443. The Court of Appeals contended that the phrase "the new development" referred ambiguously to all new developments or to the particular development seeking approval. *Id.* The court necessarily found a second instance of ambiguity in whether the impact fees had to be "reasonably related to" "the cumulative impacts of all new development activity" or to "the individualized impacts of the permittee's specific project." *Id.* Only by declaring RCW 82.02.050(3) ambiguous was the court able to embark sua sponte on a lengthy examination of legislative history, *id.* at 781-86, 83 P.3d 443, and to conclude with an application of two canons of statutory construction. *Id.* at 786-90, 83 P.3d 443; *see Campbell & Gwinn*, 146 Wash.2d at 11-12, 43 P.3d 4 (noting that recourse to legislative history is appropriate only where intended meaning is indiscernible from plain language of provision and related provisions and statutes).

are imposed . . . [s]hall include *a schedule of impact fees . . . for each type of development activity* that is subject to impact fees, *specifying the amount of the impact fee* to be imposed *for each type of system improvement.* The schedule shall be based upon *a formula or other method* of calculating such impact fees." RCW 82.02.060(1) (emphasis added). The legislature further prescribed that the local government's impact fee ordinance "[s]hall establish one or more *reasonable* service areas within which it shall calculate and impose impact fees for *various land use categories per unit of development.*" RCW 82.02.060(6) (emphasis added). The legislature thus indicated that a reasonable relationship would be achieved between the funded improvements and the individual development if the local government defined a reasonable service area, identified the public facilities therein that would require improvement over a span of six years, and prepared a fee schedule taking into account the type and size of the development seeking approval as well as the type of public facility being funded.

Other provisions in the GMA impact fee statutes support the conclusion that the legislature authorized local governments to calculate the fees by tying the particular development to the service area's improvements *as a whole,* not to *particular* system improvements within the service area. First, RCW 82.02.060(4) and (5) provide that the local government's impact fee ordinance must "allow the county, city, or town . . . to adjust the standard impact fee . . . to consider unusual circumstances in specific cases" and to consider "studies and data submitted by the developer." These provisions, in conjunction with the requirements of the fee schedule, serve the legislature's aim of "ensur[ing] that impact fees are imposed through established procedures and criteria so that specific developments do not pay arbitrary fees or duplicative fees for the same impact." RCW 82.02.050(1)(c). Just as the very existence of section .060(4) and (5) underscores that a particular development's impact fee is the product of a predetermined schedule for the service area,

the distinction between "system improvements" and "project improvements" likewise makes it clear that a particular development's impact fee is computed with reference to all improvements in the service area, not simply with regard to those individual projects that the particular development directly affects. *See supra* note 2.

By requiring a general fee schedule for planned, systemwide improvements and allowing individualized fee calculations as an exception, the legislature distinguished the impact fee statutes from the regulatory fees referred to in RCW 82.02.020:

> Except as provided in RCW 82.02.050 through 82.02.090, no county, city, town, or other municipal corporation shall impose any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of residential buildings, commercial buildings, industrial buildings, or on any other building or building space or appurtenance thereto, or on the development, subdivision, classification, or reclassification of land. However, this section does not preclude dedications of land . . . within the proposed development . . . which the county, city, town, or other municipal corporation can demonstrate are reasonably necessary as a *direct* result of the proposed development . . . .
>
> This section does not prohibit voluntary agreements with counties, cities, towns, or other municipal corporations that allow a payment in lieu of a dedication of land or to mitigate a *direct* impact that has been identified as a consequence of a proposed development. . . .

(Emphasis added.) GMA impact fees are likewise distinct from those exacted under the State Environmental Policy Act (SEPA), chapter 43.21C RCW, which authorizes

local jurisdictions to impose conditions on a proposed development "to mitigate *specific* adverse environmental impacts." RCW 43.21C.060 (emphasis added). Similarly, the local transportation act (LTA), chapter 39.92 RCW, limits the fee to "the amount that the local government can demonstrate is reasonably necessary as a *direct* result of the proposed development." RCW 39.92.030(4) (emphasis added). Notably, in the GMA impact fee statutes, the legislature did *not* require that the funded facilities be *directly* or *specifically* related and beneficial to the development seeking approval. Whereas the starting point in the calculation of SEPA or LTA fees is the individual development and its direct impact, the local government's calculation of a proposed development's GMA impact fee begins, in contrast, with the anticipation of the area-wide improvements needed to serve new growth and development in the aggregate.

Ignoring the distinction between impact fees under RCW 82.02.050-.090 and land dedications under RCW 82.02.020, the dissent takes the contrary view that local governments must base GMA impact fees on individualized assessments of the direct impacts each new development will have on each improvement planned in a service area. To advance this claim, the dissent resorts to inapposite legislative history. *See supra* note 3. According to the dissent, "[t]he legislative history, well documented by the Court of Appeals, *conclusively demonstrates* "the legislature's intent that "the *Nollan/Dolan* standard"—drawn from two Fifth Amendment physical takings cases, the latter postdating the GMA—"be applied with regard to RCW 82.02.050(3)(a)-(c)." Dissent at 14-15 & n.11 (emphasis added) (citing *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994)). The dissent does not explain that neither *Nollan* nor *Dolan* concerned the imposition of impact fees but addressed instead the authority of a local government to condition

development approval on a property owner's dedication of a portion of land for public use; nor does the dissent mention that neither the United States Supreme Court nor this court has determined that the tests applied in *Nollan* and *Dolan* to evaluate land exactions must be extended to the consideration of fees imposed to mitigate the direct impacts of a new development, much less to the consideration of more general growth impact fees imposed pursuant to statutorily authorized local ordinances. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702-03, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999) (noting that the Court has "not extended the rough-proportionality test of *Dolan* beyond the special context of exactions-land-use decisions conditioning approval of development on the dedication of property to public use"). For the proposition that the *Nollan-Dolan* standard should apply to GMA impact fees, the dissent inaptly cites decisions from other jurisdictions applying that standard to *direct* mitigation fees of the type referred to in RCW 82.02.020 (that is, to fees in lieu of possessory exactions), not to the legislatively prescribed development fees at issue here.[4]

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[4] For example, the dissent relies on *Ehrlich v. City of Culver City*, 12 Cal.4th 854, 50 Cal.Rptr.2d 242, 911 P.2d 429, 444, *cert. denied*, 519 U.S. 929, 117 S.Ct. 299, 136 L.Ed.2d 218 (1996). There, the owner of a tennis and fitness club sought approval to replace the facility with a condominium development. To address the loss of the recreational space, the city, in response to the developer's offer to build four new tennis courts, conditioned project approval on a payment of $280,000 in lieu of the four courts. The California State Supreme Court concluded that the *Nollan-Dolan* standard applicable to land exactions for direct impacts should also apply to fees imposed in lieu of such exactions for direct impacts. *Id.* at 447. Significantly, the *Ehrlich* court observed that "it is not at all clear that the rationale (and the heightened standard of scrutiny) of *Nollan* and *Dolan* applies to cases in which the exaction takes the form of a *generally* applicable development fee or assessment—cases in which

(continued...)

Nevertheless, despite the absence of any link between the *Nollan-Dolan* standard and the impact fees authorized in RCW 82.02.050-.090, the dissent identifies, as "the most important conclusion to be drawn from the legislative history," "the legislature's deliberate use of the *identical* terms [used by the *Nollan* Court] to describe the 'nexus' requirement of the Fifth Amendment: 'reasonably related to.'" Dissent at 15 (citing *Drebick*, 119 Wash.App. at 785, 83 P.3d 443 (quoting *Nollan*, 483 U.S. at 838, 107 S.Ct. 3141)). First, to be clear, the Court of Appeals pointed to *nothing* in the legislative history that referred to the *Nollan* test, much less anything revealing that legislators had considered and deliberately applied language drawn from *Nollan.* Second, given that the legislature has used the phrase "reasonably related to" in literally dozens of statutes, its use of the phrase in the impact fee statutes could not be less remarkable; certainly, the presence of this commonplace standard does not, as the dissent claims, "conclusively demonstrate[ ]" the legislature's "deliberate use" of the *Nollan* standard.[5] Finally, we find equally flawed the dissent's claim that "the definition of 'proportionate share' in RCW 82.02.090(5) supports the conclusion that the legislature intended the *Nollan* definition of 'reasonably related.'" Dissent at 18. The dissent states that the "definition clearly defines the amount of impact fees that can be charged in relation to the specific proposed development," but here the dissent rewrites the provision, which refers to "*the service demands and needs of new development*"—not "*the* new development," as the

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[4] (...continued)
the courts have deferred to legislative and political processes to formulate 'public program[s] adjusting the benefits and burdens of economic life to promote the common good.'" *Id.* (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978)).

[5] Notably, the hearing examiner did not import the *Nollan-Dolan* standard into his analysis of the statutory standards. CP at 42.

dissent interprets it. *Id.* (second emphasis added). In sum, legislative history provides no support for the dissent's claim that, by using the term "reasonably related to," the legislature manifested its intention to require local governments to calculate GMA impact fees by making individualized assessments of each proposed development's direct impact on each improvement planned in a service area.

The City's Calculation of Transportation Impact Fees. Exercising the authority granted in RCW 82.02.050(2) and adhering to the requirements of RCW 82.02.060, the City adopted its transportation impact fee ordinances, codified in former OMC 15.06, 15.10, 15.14, and 15.18. As permitted in RCW 82.02.060(6), the City "elected to base its fee structure on a single service area coterminous with its Urban Growth Area." Admin. R. at 6. Having reviewed the City's method of calculating transportation impact fees, the hearing examiner summarized the City's method as follows:

> (a) Project the cost of the transportation improvement projects in the UGA needed to provide capacity for new growth over the six-year period from 1994 to 2000. This estimate does not include the cost of improvements to address existing deficiencies and has been reduced to account for the percentage of pass-through traffic and funds expected from grants and various other sources.
>
> (b) Project the total number of new, afternoon peak-hour trips with at least one end in the UGA during the same six-year period.
>
> (c) Divide the projected cost from (a) by the projected number of trips in (b) for the average cost of a new trip in the UGA over the six-year period.
>
> (d) Convert this average cost into impact fees for specific types and sizes of development by

> considering the number of vehicle trips entering or leaving the land use at issue during the afternoon peak hour, the varying trip lengths generated by different land uses, and the percentage of "pass-by" trips.

CP at 21. In former OMC 15.18.010, the City set forth the resulting fee schedule, as required in RCW 82.02.060(1). In compliance with RCW 82.02.060(4) and (5), former OMC 15.10.020 allowed individual developers to request departures from the fee schedule and permitted the City to consider independent fee calculations on a case-by-case basis.[6]

The hearing examiner then made the following findings regarding the City's legislatively adopted fee schedule:

> 34. Under the method used by Olympia to calculate transportation impact fees, the impact fee assessed a specific development *is proportionate to and reasonably related to the jurisdiction-wide need for new transportation improvements created by that development.*
>
> 35. Every land use benefits in a general sense from a smoothly functioning transportation system with adequate capacity *in the jurisdiction in which it is located.* Under Olympia's method the transportation impact fee assessed a specific development *is used for improvements that will reasonably benefit that development, if benefit is*

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[6] "Independent fee calculations have been granted by the City in the past where it was shown that the development in question did not generate projected peak hour traffic flows or that the traffic, if generated, primarily utilized transportation facilities in other cities. Cited examples were an apartment complex for the aged, a boat repair workshop, and a hotel on the edge of the City." CP at 7.

> *judged by the effect of the transportation improvements in the jurisdiction as a whole.*

CP at 22 (emphasis added). Paraphrasing his findings, the hearing examiner repeated that "the Drebick fee is proportionate to and reasonably related to the demand for new capacity improvements *considered as a whole*" and that "those improvements *considered as a whole* will benefit the Drebick development." *Id.* at 32 (emphasis added). The hearing examiner's reference to "the jurisdiction-wide need for new transportation improvements," "the transportation improvements in the jurisdiction as a whole," and "improvements considered as a whole" is consistent with the statute's definition of "system improvements" as those "public facilities . . . designed to provide service to service areas within the community at large, in contrast to project improvements." RCW 82.02.090(9). The City permissibly defined its "service area" as the City's urban growth area, a fact that explains the hearing examiner's use of the words "jurisdiction-wide" and "jurisdiction." The hearing examiner thus found that the City's method for calculating transportation impact fees met the statutory requirement that "system improvements" be "reasonably related to" and "reasonably benefit" the specific development. RCW 82.02.050(3)(a)-(c), .090(9).

The dissent takes issue with the City's designation of a single service area. However, RCW 82.02.060(6) mandates that a local government's impact fee ordinance must "establish *one* or more reasonable service areas." (Emphasis added.) Moreover, nowhere in the hearing examiner's findings and conclusions was the City's compliance with RCW 82.02.060(6) questioned. *See* CP at 13-48. Indeed, in the only finding touching on the reasonableness of the City's designation of a single service area, the hearing examiner stated that the City's traffic consultant had found "the use of a jurisdiction-wide average cost as the basis for the impact fee rates . . . justified, because *the City's relatively compact geography* matched

closely with the average trip lengths, such that in most cases an average trip would traverse a good portion of the City boundaries." *Id.* at 22 (emphasis added). Nevertheless, proceeding as though the reasonableness of the service area were an issue before this court, the dissent attacks the City's designation and, in a hallucinatory sequence, actually likens Olympia to the San Juan Islands. *See* dissent at 12-13. The dissent disregards the qualification in RCW 82.02.090(8) that "[s]ervice areas *shall be designated on the basis of sound planning or engineering principles.*" (Emphasis added.) Were we called upon to review a city's compliance with that statutory requirement, we would doubtless rely on evidence previously provided by city planners, engineers, and other experts, not on the deployment of our own strained hypotheticals. We also note that, while the definition of "[s]ervice area" requires that the "public facilities" within the designated area "provide service to development within the area," that requirement simply does not mean, as the dissent contends, that for a service area to be reasonable each public facility in the service area must directly serve each new development project. RCW 82.02.090(8). The dissent's contention rests on the insupportable notion that "development within the area" does not mean area-wide development but means instead *the particular new* "development" *project seeking approval* "within the area." In the dissent's view, the only "reasonable" service area would be one no larger than the project site for the new development seeking approval, but the statutory scheme clearly distinguishes between project sites and service areas.[7]

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[7] *See supra* note 2 (distinguishing "project improvements" and "system improvements"). The dissent's reliance on *Trimen Development Co. v. King County*, 124 Wash.2d 261, 877 P.2d 187 (1994), underscores the dissent's mistaken belief that GMA impact fees are indistinguishable from the direct mitigation fees of RCW 82.02.020. Dissent at 11-12. Even though the fees at issue in *Trimen*

(continued...)

The hearing examiner's inquiry should have ended with his factual findings that "the Drebick fee is proportionate to and reasonably related to the demand for new capacity improvements *considered as a whole*" and that "those improvements *considered as a whole* will benefit the Drebick development." CP at 32 (emphasis added). However, the hearing examiner went on to hold that the City's calculations violated RCW 82.02.050(3) because Drebick's impact fee was not "reasonably related to the service demands or needs created by the Drebick proposal on *each* of the individual project groups on which the impact fees [were] based." CP at 22 (emphasis added); *see supra* note 6. But as discussed above, nothing in the plain language of the GMA impact fee statutes supports the hearing examiner's view that the City was required to calculate Drebick's impact fees by *individually* assessing his development's *direct, specific* impact on *each* of the improvements listed in the City's capital facilities plan.

Nor is there any support to be found in prior cases interpreting the impact fee statutes. In *New Castle Investments v. City of LaCenter*, 98 Wash.App. 224, 989 P.2d 569, *review denied*, 140 Wash.2d 1019, 5 P.3d 9 (2000), a developer challenged the applicability of the city's GMA impact fee ordinance on the grounds that it was adopted two days after the proposed development was approved. The developer argued that, under the vesting statute (RCW 58.17.033), the development was subject only to the "land use control ordinances" in effect at the time the application was perfected. Division Two concluded, however, that the GMA impact fees' "resemblance to taxes" removed them from the definition of

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[7] (...continued)
predated the adoption of GMA impact fees and aimed to mitigate the direct impact of a development project, the dissent nevertheless claims that King County's designation of a "park service area" immediately surrounding the new development "provides an example of an appropriate ordinance" for Olympia. *Id.* at 12.

"'land use control ordinance.'" *Id.* at 235, 989 P.2d 569. Noting that the GMA impact fee statutes were "codified among excise taxes in RCW 82," the *New Castle* court distinguished the fees from the regulatory exactions of SEPA, the LTA, and RCW 82.02.020: "By the clear language of the statute, GMA impact fees are not intended to compensate local governments for the *direct impacts* of specific development projects *on specific components of local infrastructure systems* or to finance programs that regulate development." *Id.* at 235-36, 989 P.2d 569 (emphasis added). In *Wellington River Hollow, L.L.C. v. King County*, 121 Wash.App. 224, 54 P.3d 213 (2002), *review denied*, 149 Wash.2d 1014, 70 P.3d 965 (2003), Division One of the Court of Appeals agreed with the *New Castle* court's interpretation of RCW 82.02.050(3) and rejected a developer's claim that school impact fees imposed on a proposed apartment complex had to "specifically benefit" the students generated by the development. *Id.* at 237, 989 P.2d 569.

CONCLUSION

The GMA impact fee statutes permit local governments to base impact fees on area-wide infrastructure improvements reasonably related and beneficial to the particular development seeking approval. We agree with the superior court's conclusion that "this 'rational' [or 'relational'] standard . . . [is] broader than the standard under [SEPA or the LTA]." CP at 674. As the superior court correctly determined, the hearing examiner erred in concluding that the GMA impact fee statutes required the City to calculate Drebick's impact fee by making individualized assessments of the Drebick development's direct impact on each improvement planned in a service area. We hold that the City's method for calculating transportation

impact fees complied with the plain language of the GMA impact fee statutes. We therefore reverse the Court of Appeals.

/s/ Owens, J

WE CONCUR:

/s/ C. Johnson, J.

/s/ Bridge, J.

/s/ Madsen, J.

/s/ Fairhurst, J.

/s/ Becker, J.P.T.

SANDERS, J. (dissenting).

The City of Olympia (City) claims the fees at issue here "are, in essence, excise taxes on new development generally . . ."[1] "because the ultimate purpose of the fees is to generally raise revenue to fund needed public facilities and infrastructure."[2] I agree. The resulting problem for the City is therefore twofold: (1) the City has not been statutorily authorized to impose an excise tax on new development and (2) the City has been specifically prohibited by RCW 82.02.020 from doing just that. To put it simply, the only way these fees could pass statutory, much less constitutional,[3] muster is that

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[1] Br. of Resp't City of Olympia (Ct.App.29018-9-II) at 12.

[2] *Id.* at 13.

[3] Absent express authorization, municipalities may not impose a tax (*Hillis Homes, Inc. v. Snohomish County*, 97 Wash.2d 804, 809, 650 P.2d 193 (1982), Wash. Const. art. VII, § 2), and municipalities may not tax contrary to the general laws (*R/L Assoc., Inc. v. City of Seattle*, 113 Wash.2d 402, 780 P.2d 838 (1989) and *San Telmo*

(continued...)

they be true "impact fees" as that term is defined and limited by the legislature, which excise taxes clearly are not.

Having stated the general proposition, I repair to the facts which demonstrate these fees are indeed excise taxes on new construction, precisely as contended by the City.

In 1998 petitioner Drebick Investments (Drebick) sought land use approval from the City to construct a four-story office building complex at a corner of the city boundary near an exit to Highway 101. The municipality imposed a $132,000 traffic fee as a condition to new development based upon contemplated cost of citywide traffic projects without regard to the specific impact the Drebick development might or might not have on any proposed project or any benefit the Drebick development would derive from the new public facilities.[4] Drebick contended any additional traffic added by his construction would make minimal, if any, use of the contemplated improvements because of the remote proximity

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[3] (...continued)
Assocs. v. City of Seattle, 108 Wash.2d 20, 24, 735 P.2d 673 (1987), Wash. Const. art. VII, § 5). *See also Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), discussion *infra* pp. 14-17.

[4] The City projected the cost of all transportation improvement projects inside the urban growth area (UGA) needed to provide capacity for all new growth over a six year period. The City then projected the total number of new afternoon peak hour trips with one end inside the UGA, and it divided the cost by the number of trips. This per-trip cost was then applied to new development by multiplying the derived figure by the number of trips the new development would generate, *regardless of whether any of those trips would actually use any of the new transportation improvement projects.* Clerk's Papers (CP) at 21 (Findings and Decision of the Hr'g Exam'r of the City of Olympia, Finding 32) (Nov. 2, 2000) (Hr'g Exam'r Findings and Decision).

of his development to those projects and traffic patterns which would substantially exclude their use by new development traffic.

The matter ultimately proceeded to the City's hearing examiner. He factually found:

> 36. Under Olympia's method, a transportation impact fee does not depend on or vary with the location within the City of the development charged. The fee does not depend on or take into account whether the development charged actually contributes any trips to any of the project groups on which the fee is based.
>
> . . . .
>
> 39. Under Olympia's method, the transportation impact fee assessed the Drebick proposal is not proportionate to or reasonably related to the service demands or needs created by the Drebick proposal on each of the individual project groups on which the impact fees are based.
>
> 40. The only manner in which the Drebick proposal could be benefited by specific transportation improvements projects it will not use, considered individually, is if those improvements relieve traffic pressure on other links used by the Drebick proposal or if they improved emergency response to the Drebick proposal. No evidence was submitted showing this for any of the individual improvements. Under Olympia's method, the transportation impact fees assessed the Drebick proposal may be used for individual transportation facilities which do not reasonably benefit the Drebick proposal.

Clerk's Papers (CP) at 22-23 (Hr'g Exam'r Findings and Decision). No error has been assigned to these findings. Thus they are verities for the purposes of this appeal. *Henderson Homes, Inc. v. City of Bothell*, 124 Wash.2d 240, 244, 877 P.2d 176 (1994).

Notwithstanding, the City conditioned Drebick's use and development of his property upon payment of a transportation "impact fee" of more than $132,000. The hearing examiner set aside this fee because of its perceived conflict with chapter 82.02 RCW. The superior court then reversed the hearing examiner. However, the Court of Appeals reversed again, affirmed the hearing examiner, and remanded for further proceedings. In this context, our majority characterizes the issue to be determined:

> In calculating the transportation impact fees imposed on the Drebick development, did the city comply with the statutory standards set forth in RCW 82.02.050-.090 for apportioning such fees?

Majority at 3. Although I generally agree with the majority's characterization of the issue as a statutory one, the majority assumes the answer to the real question which is whether we should characterize these fees as "impact fees," the only fees permitted by RCW 82.02.050 through .090.

The relevant statutes are contained in chapter 82.02 RCW. RCW 82.02.020 is a broad prohibition on development fees with certain exceptions:

> Except as provided in RCW 82.02.050 through 82.02.090, no county, city, town, or other municipal corporation shall impose any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of . . . commercial buildings . . . .

The $132,000 exaction at issue is obviously within the scope of the aforementioned text since it is imposed on the

construction of commercial buildings. Moreover, and just as clearly, it is statutorily barred unless it falls within the statutory exemptions codified in RCW 82.02.050 through .090, all of which relate to "impact fees." As used in the statute, "impact fee" is a term of art defined as:

> [A] payment of money imposed upon development as a condition of development approval to pay for public facilities needed to serve new growth and development, and that is reasonably related to the new development that creates additional demand and need for public facilities, that is a proportionate share of the cost of the public facilities, and that is used for facilities that reasonably benefit the new development. . . .

RCW 82.02.090(3). Impact fees are therefore by definition site specific to the new development, unlike taxes which generally raise revenue to fund needed public facilities without regard to the impact on or benefit derived by the new individual development from those facilities. *Arborwood Idaho, LLC v. City of Kennewick*, 151 Wash.2d 359, 371, 89 P.3d 217 (2004).[5] Keeping this distinction in mind, it is telling that even the City of Olympia claims the fees at issue here "are, in essence, excise taxes on new development generally." Br. of Resp't City of Olympia (Ct.App.29018-9-II) at 12. The problem is "excise taxes on new development generally" cannot meet the definition of "impact fees" because taxes have no necessary relationship to meeting the additional demands of "the new development" nor do they necessarily benefit "the new

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[5] The majority asserts "merely labeling the GMA impact fees either taxes or regulatory fees will not be dispositive here." Majority at 3 n.1. I disagree because taxes by their nature cannot be "impact fees" as statutorily defined, and only impact fees are excepted from the broad statutory prohibition.

development" by building facilities to be actually used by the new development.

RCW 82.02.050(3) reinforces the statutory definition with express limitations:

> The impact fees:
>
> (a) Shall only be imposed for system improvements that are reasonably related to *the new development;*
>
> (b) Shall not exceed a proportionate share of the costs of system improvements that are reasonably related to *the new development;* and
>
> (c) Shall be used for system improvements that will reasonably benefit *the new development.*

(Emphasis added.) RCW 82.02.060 prescribes the format of a local impact fee ordinance:

> **Impact fees—Local ordinances—required provisions.** The local ordinance by which impact fees are imposed:
>
> (1) Shall include a schedule of impact fees which shall be adopted for each type of development activity . . . . The schedule shall be based upon a formula or other method of calculating such impact fees. In determining proportionate share, the formula or other method of calculating impact fees shall incorporate, among other things, the following:
>
> (a) The cost of public facilities necessitated by new development;
>
> (b) An adjustment to the cost of the public facilities for past or future payments . . . .;

(c) The availability of other means of funding . . . .;

(d) The cost of existing public facilities improvements; and

(e) The methods by which public facilities improvements were financed;

. . . .

(4) Shall allow the county, city, or town imposing the impact fees to adjust the standard impact fee at the time the fee is imposed to consider unusual circumstances in specific cases to ensure that impact fees are imposed fairly;

(5) Shall include a provision for calculating the amount of the fee to be imposed on a *particular development* that permits consideration of studies and data submitted by the developer to adjust the amount of the fee;

(6) Shall establish one or more reasonable service areas within which it shall calculate and impose impact fees for various land use categories per unit of development . . . .

RCW 82.02.060 (emphasis added).

I agree with the majority that the statutory terms "the new development" and "development activity" and "particular development" relate to a specific proposed project, not projected community development in the aggregate. Majority at 6-9. However, the majority essentially fails to recognize that "Impact fees" as that term is used in RCW 82.02.060 is a term of art specifically defined to be "reasonably related to *the new development* that creates additional demand and need for public facilities, that is a proportionate share of the cost of the public facilities, and that is used for facilities that reasonably benefit

the new development." RCW 82.02.090(3) (emphasis added). Further, the majority ignores RCW 82.02.050, which specifically *limits* impact fees to (a) system improvements that are reasonably related to *the new development,* (b) the proportionate share of the cost of those reasonably related system improvements reasonably related to *the new development,* and (c) system improvements that will reasonably benefit *the new development.* Rather the fees allowed by the Olympia ordinance are not calculated to specifically cure an impact of "the new development," nor are they for projects which serve the new development. Rather this fee is based on the aggregate of *all* new development without regard to the cause, consequence, or proportionality as it relates to the specific development at issue here.

In the context of this case the fee imposed on Drebick under the municipal ordinance does not meet the definition of "impact fee" because the projects funded by the fee were not reasonably necessitated by the Drebick development nor would they be necessarily even used by the Drebick development. In the same sense they violate the limitation criteria in RCW 82.02.050(3).

The conclusion that the definition and limitation clauses necessarily apply to the application of any ordinance adopted pursuant to RCW 82.02.060 is buttressed by that statute's reference to "impact fees" and other language which requires site specific consideration by any proper ordinance. Section .060(4) of the statute requires the ordinance to adjust the fee imposed "to consider unusual circumstances in specific cases to ensure that impact fees are imposed fairly." Subsection (5) requires the ordinance to "include a provision for calculating the amount of the fee to be imposed on a *particular development* that permits consideration of studies and data submitted by the developer to adjust the amount of the fee." And subsection (6) requires the ordinance "[s]hall establish one or more reasonable service areas within which it shall calculate

and impose *impact fees* for various land use categories per unit of development." (Emphasis added.) Each of those provisions specifically contemplate, consistent with the definition of impact fee and the limitations on an impact fee, that the fee be tailored to the actual impact of the specific individual new development notwithstanding the prescriptive manner of calculating the fee. The "reasonable" service areas requirement also highlights the proposition that a proper ordinance would establish service areas which actually serve the proposed development.

As to the last point, the majority seems to confuse the propriety of the service area designation with the quite independent analysis of whether the resulting fee imposed as a precondition to development meets the statutory definition of "impact fee." *See* majority at 17-20. Just because RCW 82.02.060 provides the statutory authority and outlines the necessary components of a local ordinance to assess "impact fees" within a "reasonable service area[ ]," does not mean that the resulting fee will actually *be* an "impact fee" as statutorily defined. That statutory definition includes the requirement that the fee "is reasonably related to the new development that creates additional demand and need for public facilities . . . ." RCW 82.02.090(3). Therefore, by the majority's own statutory analysis the ultimate fee must be calculated on site specific criteria. Whether or not a local ordinance which sets up a fee schedule based upon a formula and a service area actually produces a legitimate "impact fee" must, however, be determined on an as applied basis, to the Drebick building, for example.

The crux of the majority's flaw in reasoning is its assumption, absent statutory or precedential support, that any impact fee ordinance that meets the procedural requirements contained in RCW 82.02.060 *per se* produces a statutory impact fee tailored to the requirements of proportionality and reasonable causation by, and reasonable benefit to, the specific

development project at issue. Majority at 9-10. The majority's conclusion that "the legislature did *not* require that the funded facilities be *directly* or *specifically* related and beneficial to the development seeking approval,"[6] is therefore most problematic. Majority at 12.

The majority assumes this conclusion through an unanalyzed premise: a city or county is permitted to draw a single service area encompassing the whole of that city or county, and therefore all "system improvements" within that service area may be properly charged to any new development consistent with the statute. The majority's conclusory statement, "As permitted in RCW 82.02.060(6), the City 'elected to base its fee structure on a single service area coterminous with its Urban Growth Area,'" majority at 16,[7] is devoid of any discussion of the actual statutory requirement. Indeed, the actual text requires the "local ordinance by which impact fees are imposed . . . (6)[s]hall establish one or more *reasonable* service areas within which it shall calculate and impose impact fees for various land use categories per unit of development." RCW 82.02.060.

Trimen Development Co. v. King County, 124 Wash.2d 261, 877 P.2d 187 (1994) provides an example of an appropriate ordinance, although its facts arose before the

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[6] "Directly" and "specifically" are not statutory terms, nor are they derived from the relevant constitutional cases. Such terms are easily confused and misunderstood when divorced from the statutory and constitutional context. As noted, *supra*, the requirement of a nexus and rough proportionality—which define the "reasonable" relationship under the statute—dictate a certain level of connection between the impact fee and the impacts of the development. Whatever that level of connection, whether directly, specifically, reasonably, or roughly related, it is not present in this case.

[7] The majority repeats its conclusion at page 14 without further analysis.

adoption of sections .050 through .090. Under that ordinance, King County imposed park development fees on new construction. Although King County did not conduct a site specific study relating to the Trimen Development, it did calculate the general deficit of parks in the vicinity and the statistical probability of additional park use by each unit of new residential development. The fee was to be expended only in the "park service area" of the new development, an area roughly the size of elementary school boundaries. This methodology, we held, adequately demonstrates the additional need for park space necessitated by each new unit of residential development along with the cost of acquiring it within the specific area to be used by the specific new development. We went on to specifically distinguish the park fee as there calculated from a "tax" which not only lacked legislative authorization but would violate the prohibition of RCW 82.02.020, holding these park fees "are reasonably necessary as a direct result of the proposed development," and are required to mitigate the direct impact of the development. *Id.* at 270-71, 877 P.2d 187 (quoting RCW 82.02.020). However in the case at bar, as acknowledged by the City of Olympia, the fees at issue are in the nature of taxes to fund generalized public improvements which cost money, not impact fees.

Moreover, it is important to notice that the park fees were sustained in *Trimen* because they were calculated based upon a "park service area" around the new development only approximately the size of elementary school boundaries, i.e., an area where projected new residents would reasonably recreate in any new park space to be acquired. However, the difference between the park service area approved in *Trimen* and the citywide service area in the case at bar is a qualitative difference of exponential magnitude. Trimen residents would probably use the new park space whereas Drebick customers would not necessarily use new traffic improvements geographically remote from the Drebick building.

But by the majority's logic, it is "reasonable" for a city which comprises 17 square miles,[8] has almost 80 miles of major roads,[9] and has a population of 43,330 people,[10] to draw a *single* service area and therefore any resulting fee must be a legitimate "impact fee."

Thus, King County could define its service area as the entire county. A new resident of Vashon Island could be made to pay fees for a system improvement made in Skykomish, even though the Vashon resident may *never* use a road improvement located 60 miles—and one large body of water—away. Or perhaps Stevens County might decide to charge "new development" located outside Northport for a transportation improvement located outside Tumtum, 80 miles distant? Or San Juan County could charge developers on Orcas Island to add a lane to a road on Lopez Island? All this is perfectly sanctioned by the majority opinion, although none of the resulting fees imposed under such ordinances would be reasonably related to the new development nor reasonably benefit the new development and hence neither fits the statutory definition of "impact fee" nor complies with RCW 82.02.050.

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[8] *See* U.S. Census Bureau, State and County Quickfacts, http://quickfacts.census.gov/qfd/states/53/5351300.html (last visited Jan. 13, 2006).

[9] Including interstates, arterials, and collectors, but not even including smaller roads.

[10] *See* Municipal Research & Servs. Ctr. of Wash., http://www.mrsc.org/cityprofiles/cityprofile.aspx?id=167 (last visited Jan 13, 2006). Olympia is the 19th largest city in Washington State. *Id.*, *http:*//www.mrsc.org/subjects/finance/ctytax04p.aspx.

Further, the statutory definition of "service area" belies the majority's conclusion that Olympia appropriately drew a single service area for the entire city. RCW 82.02.090(8) defines "[s]ervice area" as "a geographic area defined by a county, city, town, or intergovernmental agreement in which a defined set of public facilities *provide service* to development within the area." (Emphasis added.) A road which no customer, resident, or visitor to the new development will use hardly provides service to that development.

In addition to its failure to properly follow the "reasonable" requirement in relation to the scope of the service area, which might at least begin to re-moor the statute to its constitutional pilings, the majority fails to apply "reasonably related" or "reasonably benefit" according to the expressed intent of the legislature. The majority does this by accepting unchallenged the assertion that "Every land use benefits in a general sense from a smoothly functioning transportation system with adequate capacity *in the jurisdiction in which it is located.*" Majority at 17 (quoting CP at 22 (Hr'g Exam'r Findings and Decision, Finding 35)). Yes, but that is what taxes are for.

At this level of abstraction every improvement in any city or county is *per se* reasonably related to new development in that city or county and reasonably benefits new development in that city or county. The "reasonableness" protections of the statute, the definition of impact fees, the statutory limits on impact fees, are thus rendered a nullity. The legislature could have composed a much simpler statute by simply authorizing local governments to impose jurisdiction-wide excise taxes on all new development without regard to the impact that new development might have on public facilities. But it didn't. Yet that's what the majority gives us.

Most fundamentally only "system improvements" can be financed by "impact fees," RCW 82.02.050(3), but such system improvements must still be reasonably related to and reasonably benefit the new development to be "impact fees." RCW 82.02.050(3)(a)-(c).

However this ordinance requires *no* relation between the new development and the public facility, yet alone a "reasonable" one. But we need not rely on the common understanding of the text. The legislative history, well documented by the Court of Appeals, conclusively demonstrates that the standard of "reasonableness" the legislature intended to be applied with regard to RCW 82.02.050(3)(a)-(c) and 82.02.060(6) is the *Nollan/Dolan* standard.[11]

The Court of Appeals extensively reviewed the legislative history of House Bill 2929,[12] which was the initial legislation of what became known as the Growth Management Act (chapter 36.70A RCW). For our purposes the most important conclusion to be drawn from the legislative history is the legislature's deliberate use of the *identical* terms the United States Supreme Court used to describe the "nexus" requirement of the Fifth Amendment: "reasonably related to." *City of Olympia v. Drebick*, 119 Wash.App. 774, 785, 83 P.3d 443 (2004) (quoting *Nollan*, 483 U.S. at 838, 107 S.Ct. 3141). As the Court of Appeals noted:

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[11] *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994).

[12] *See City of Olympia v. Drebick*, 119 Wash.App. 774, 781-85, 83 P.3d 443 (2004).

> When the 1990 legislature was considering the GMA, it undoubtedly knew about *Nollan*, which was then the *only* case in which the United States Supreme Court had addressed the propriety of conditioning a building permit on the exaction of private property without compensation. Thus, we infer that the 1990 legislature did not use *Nollan*'s phrase ("reasonably related to") by coincidence; instead, we think, the legislature used the same phrase with intent to adopt *Nollan*'s meaning and assure the new statute's constitutionality. *Nollan* had used the phrase ("reasonably related to") to mean a link or "nexus" between the public problem to be alleviated and the individualized impacts of the permittee's *specific* project, and we conclude that the 1990 legislature used the same phrase in the same way.

Id.[13]

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[13] Further, the legislature is presumed to be familiar with judicial decisions on the subject on which it is legislating. *Daly v. Chapman*, 85 Wash.2d 780, 782, 539 P.2d 831 (1975).

Nollan, of course, required a nexus between the exaction[14]

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[14] The majority claims "nor does the dissent mention that neither the United States Supreme Court nor this court has determined that the tests applied in *Nollan* and *Dolan* to evaluate land exactions must be extended to the consideration of fees imposed to mitigate the direct impacts of a new development, much less to the consideration of more general growth impact fees imposed pursuant to statutorily authorized local ordinances." Majority at 13-14. Quite correct, because the United States Supreme Court *has* vacated statutorily imposed monetary impact fees for further consideration in light of *Dolan*. *Ehrlich v. City of Culver City*, 512 U.S. 1231, 114 S.Ct. 2731, 129 L.Ed.2d 854 (1994). On remand the California Supreme Court "reject[ed] the proposition that *Nollan* and *Dolan* are entirely without application to monetary exactions." *Ehrlich v. City of Culver City*, 12 Cal.4th 854, 876, 50 Cal.Rptr.2d 242, 911 P.2d 429, 444 (1996). *See also Benchmark Land Co. v. City of Battle Ground*, 103 Wash.App. 721, 14 P.3d 172 (2000), *aff'd on other grounds by Benchmark Land Co. v. City of Battle Ground*, 146 Wash.2d 685, 49 P.3d 860 (2002) (holding that *Dolan* proportionality test applies to impact fees); Sandra M. Stevenson, ANTIEAU ON LOCAL GOVERNMENT LAW 4-56, at § 56.05 (2d ed.2005); ZONING AND LAND USE CONTROLS, PART II, MODERN ZONING TRENDS, CH. 9: EXACTIONS, IMPACT FEES AND OTHER LAND DEVELOPMENT CONDITIONS, 2-9 ZONING AND LAND USE CONTROLS § 9.02, "Nexus, Proportionality, and Takings: Nollan, Dolan and Progeny, [4] Applicability of *Nollan* and *Dolan* to All Land Development Conditions" (Matthew Bender 2005) and *id.*, § 52A.04 at 8-52A, "Established and Emerging Rules in Takings Cases, [2] Categorical Rules in Exactions Cases, [c] Combined Effect of the 'Rational Nexus' and 'Rough Proportionality' Tests" (citing *Benchmark Land Co.*, 94 Wash.App. 537, 972 P.2d 944, concluding that *Nollan* and *Dolan* tests apply to fees); *City of Portsmouth v. Schlesinger*, 57 F.3d 12, 16-17 (1st Cir.1995) (impact fee unlawful exaction); *Consumers Union of U.S., Inc. v. State*, 5 N.Y.3d 327, 354- 355, 806 N.Y.S.2d 99, 840 N.E.2d 68 (2005) (fee is exaction to which *Nollan* and *Dolan* apply); *Home Builders Ass'n v. City of Beavercreek*, 89 Ohio St.3d 121, 128, 729

(continued...)

and the individualized impacts of the specific project. *Nollan*, 483 U.S. at 837, 107 S.Ct. 3141. *Dolan* extended *Nollan* by additionally requiring that the exaction be roughly proportional to the impacts of the development. *Dolan*, 512 U.S. at 391, 114 S.Ct. 2309. But even if the legislature had only *Nollan*'s definition of "reasonably related" in mind when it used the exact same phrase, our majority defeats the *Nollan* and the Washington State Legislature's definition.

The citywide averaged fee imposed in this case by definition does not consider the individual impacts of Drebick's development and therefore fails both the *Nollan* test and the requirement that the impact fee be "reasonably related" to the development under RCW 82.02.050(3).[15]

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[14] (...continued)
N.E.2d 349, 356 (2000) (using *Nollan* and *Dolan* tests when "evaluating the constitutionality of an impact fee ordinance"); *Town of Flower Mound v. Stafford Estates, L.P.*, 135 S.W.3d 620, 639-40 (Tex.2004) (applying *Nollan* and *Dolan* to impact fees); J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied Nollan and Dolan and Where They Should Go From Here*, 59 WASH. & LEE L. REV. 373, 390 (2002) (noting "growing recognition that the logic of *Nollan* and *Dolan*" applies to fees).

[15] The majority posits a distinction between a "'*generally* applicable development fee'" and a site specific fee. Majority at 14 n.4 (quoting *Ehrlich v. City of Culver City*, 12 Cal.4th 854, 881, 50 Cal.Rptr.2d 242, 911 P.2d 429, 444, *cert. denied*, 519 U.S. 929, 117 S.Ct. 299, 136 L.Ed.2d 218 (1996)). I think the majority's misimpression might be cured if it placed the quoted material in proper context:

> One of the central promises of the takings clause is that truly public burdens will be publicly borne. Where the regulatory land-use power of local government is deployed against individual property owners through

(continued...)

Finally, the definition of "[p]roportionate share" in RCW 82.02.090(5) supports the conclusion that the legislature intended the *Nollan* definition of "reasonably related" (and also tracks *Dolan*). RCW 82.02.050(3)(b) provides that "impact fees . . . [s]hall not exceed a proportionate share of the costs of system improvements that are reasonably related to the new development." RCW 82.02.090(5) defines "[p]roportionate share" as "that portion of the cost of public facility improvements that are reasonably related to *the service demands and needs of new development.*" This definition clearly defines the amount of impact fees that can be charged in relation to the specific proposed development. The "service

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[15] (...continued)

> the use of conditional permit exactions, the *Nollan* test helps to secure that promise by assuring that the monopoly power over development permits is not illegitimately exploited by imposing conditions that lack any logical affinity to the public impact of a particular land use. The essential nexus test is, in short, a "means-ends" equation, intended to limit the government's bargaining mobility in imposing permit conditions on individual property owners—whether they consist of possessory dedications or the exaction of cash payments—that, because they appear to lack any evident connection to the public impact of the proposed land use, *may* conceal an illegitimate demand--may, in other words, amount to "'out and out . . . extortion.'" (*Nollan, supra,* 483 U.S. at p. 837 [107 S.Ct. at p. 3149, 97 L.Ed.2d at p. 689].).

Ehrlich, 12 Cal.4th at 876, 50 Cal.Rptr.2d 242, 911 P.2d 429. Drebick was indeed subjected to a "conditional permit exaction[ ]" which also "lack [ed] any logical affinity to the public impact of [his] particular land use." *Id.* The fact that the fee was calculated pursuant to a formula the application of which "lack[s] any logical affinity to the public impact of a particular land use" hardly cures the constitutional problem which would exist if the same exaction were imposed in the absence of a formulaic ordinance.

demands" of the new development aren't for a "functioning transportation system," an abstract notion not susceptible to definition in any event, but for certain capacities on specific roadways that will be utilized by the development's customers and employees.

This court's duty is to construe statutes constitutionally if such is possible. *High Tide Seafoods v. State*, 106 Wash.2d 695, 698, 725 P.2d 411 (1986). Given that the legislatively intended definition of "reasonably related to" in RCW 82.02.050 complies with—and indeed is identical to—the requirements of *Nollan* and *Dolan*, a constitutional construction is certainly available. Indeed, we have upheld impact fees while specifically noting *Dolan*'s requirements where a reasonable service area was drawn under an ordinance that required the infrastructure to actually serve the new development. *See Trimen Dev. Co. v. King County*, 124 Wash.2d 261, 274, 877 P.2d 187 (1994).[16]

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[16] The majority's citation to *New Castle Investments v. City of LaCenter*, 98 Wash.App. 224, 989 P.2d 569 (1999), and *Wellington River Hollow, L.L.C. v. King County*, 121 Wash.App. 224, 54 P.3d 213 (2002) are unavailing. *New Castle* was not a case about the validity of impact fees but about whether the impact fees are land use control ordinances for purposes of our state vesting statute. Further, the Court of Appeals specifically noted that *Nollan/Dolan*'s requirement of rough proportionality is not necessarily a direct relationship (which would comport with the "exacting correspondence" rejected in *Dolan*, 512 U.S. at 389-90, 114 S.Ct. 2309), but there still must be a "roughly proportional" relationship—a relationship the *Dolan* court derived specifically from the "reasonable relationship" test adopted by numerous other state courts. *See Dolan*, 512 U.S. at 391, 114 S.Ct. 2309. *Wellington* upheld a school impact fee imposed based on projected student enrollment in the school district from the new development. This was at least *some* link between the impact—more students—and the solution—school improvements. But here the City of Olympia did

(continued...)

The literal text of chapter 82.02 RCW requires an impact fee imposed under RCW 82.02.050-.090 be "reasonably related to" and "reasonably benefit" the new development and that local governments define "reasonable" service areas. The legislature used *Nollan*'s exact language for a reason, and the requirement that there at least be a nexus between the impact of the development and the fee imposed thus defines the "reasonableness" of such fees. But here there is no demonstrated connection between this fee and any impact of this development; just the opposite. Thus I would hold that Olympia's citywide averaged fee as applied here violates RCW 82.02.020.

I dissent.

/s/ Sanders, J.

/s/ J.M. Johnson, J.

/s/ Chambers, J.

I concur in result only.

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[16] (...continued)
not demonstrate any link between the "impact" of the new development and the capital facilities to be built. In *Wellington* some of the improvements were the addition of classrooms at a high school near the development. However, to the extent that *Wellington* held that impact fees could be imposed where no use of the facilities by students from the new development would occur, the Court of Appeals opinion in *Wellington* should not be followed.

Appendix B–1

FILED APR. 13, 2006

THE SUPREME COURT OF WASHINGTON

CITY OF OLYMPIA, a Washington code city, Petitioner, v. JOHN DREBICK and JANE DOE DREBICK, husband and wife, d/b/a/ DREBICK INVESTMENTS, Respondents.	)	NO. 75270-2 **ORDER DENYING MOTION FOR RECONSIDERATION**

The Court [Chief Justice Alexander recused] having considered Respondents' Motion for Reconsideration;

Now, therefore, it is hereby

ORDERED:

That Respondents' Motion for Reconsideration is denied.

DATED at Olympia, Washington this 13th day of April, 2006.

For the Court

/s/ C. Johnson J
ACTING CHIEF JUSTICE

Appendix C–1

FILED JAN. 22, 2004

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

CITY OF OLYMPIA, a Washington code city,	)	No. 29018-9-II
	)	
	)	PUBLISHED OPINION
Respondent,	)	
	)	
v.	)	
	)	
JOHN DREBICK and JANE DOE DREBICK, husband and wife, d.b.a. DREBICK INVESTMENTS,	)	
	)	
	)	
Appellants.	)	

MORGAN, J.—John Drebick wanted to build an office building in the City of Olympia. Citing the Growth Management Act (GMA),[1] the City of Olympia conditioned the building permit for a new office building on his payment of a traffic impact fee. Acting pursuant to Title 15 of its Municipal Code, the City calculated the fee by averaging the cumulative traffic-related impacts of all new office buildings. We assume that when the City made its calculation, it did not determine the

[1] Laws of 1990, 1st Ex. Sess., ch. 17.

individualized traffic-related impacts of the specific building.[2] A hearing examiner held that the fee could not exceed the individualized impacts of the specific building, but the superior court held to the contrary. Agreeing with the hearing examiner, we reverse the superior court and remand for further proceedings.

In 1998, John Drebick sought a building permit from the City of Olympia. He wanted to build a new commercial office building near the City's boundary, just off Highway 101. The building was to have four stories and 54,698 square feet. The City granted the permit on the condition that Drebick help to improve the City's roads by paying a traffic impact fee.

The City calculated the fee by estimating (1) the total square footage of all new commercial office space likely to be built within the city's boundaries and (2) the cost of all road improvement projects that such space would necessitate within the city's boundaries. It then divided (1) into (2) to obtain an average rate per square foot that each new office building should pay toward all of the City's road improvement projects, regardless of any particular building's traffic-related impacts. Multiplying this average rate ($2.95 per square foot) times the number of square feet in Drebick's specific development (54,698) resulted in a fee of $161,359,[3] which Drebick paid under protest.[4]

Drebick appealed to the City's hearing examiner. Citing RCW 82.02.050(3), he argued in part that the City could not

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[2] The parties agree that the City did not determine individualized impacts quasi-judicially, and we assume that the City could not or did not determine such impacts legislatively.

[3] Drebick paid $132,328 in cash and the remainder through certain credits not at issue here.

[4] *See* RCW 82.02.070(4).

impose an impact fee that exceeded the individualized traffic-related effects of his specific project and that those effects would be fully mitigated by a payment of about $29,000. The City countered that it was imposing an excise tax, not a regulatory fee, and thus that it could impose such a tax without regard to the individualized impacts of Drebick's specific project.

The hearing examiner agreed with Drebick. Accordingly, he "reversed on the issue of whether the . . . impact fees comply with the . . . requirements of RCW 82.02.050(3)."[5] He also remanded to the City for "adjustments . . . consistent with this decision."[6]

The City appealed to the Thurston County Superior Court, which reversed the hearing examiner. The superior court held that the City's assessment was "analogous to" a tax and thus that the City did not have to show a "proportional nexus" between its assessment and the traffic-related effects of Drebick's specific project.[7] Drebick tried to appeal directly to the Supreme Court, but that court transferred the case here.

In this court, Drebick contends that state law, and specifically RCW 82.02.050(3), prohibits the City from imposing a traffic impact fee without considering the traffic-related effects of his specific project. The City responds that it was imposing a tax, not a fee, and thus that state law did not require it to consider the effects of Drebick's particular development.

Preliminarily, we emphasize the limits of this opinion. As just noted, the City contends that state law does not require it to

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[5] II Clerk's Papers (CP) at 48, 318.

[6] II CP at 48, 318.

[7] IV CP at 673-74.

consider the individualized impacts of Drebick's specific project. Drebick contends to the contrary. Neither party contends that if state law requires the City to determine the individualized impacts of a specific project, the City did that by enacting an ordinance with categories narrow enough to *constitute* an assessment of individualized impacts. Accordingly, this opinion is limited to the question whether RCW 82.02.050(3) requires the City to consider and determine the individualized impacts of Drebick's specific project. We leave for another day the question whether a city can perform the necessary assessment *legislatively*, by enacting an ordinance with narrow enough categories, or whether a city must perform the necessary assessment *quasi-judicially*, through a hearing examiner or similar official. In short, we analyze the meaning of state law, but not whether the City's ordinance complies with state law.

Beginning our analysis, we have no quarrel with the City's claim that it was imposing a tax rather than a fee.[8] For purposes of this case, however, the distinction is immaterial. RCW 82.02.020 was amended as part of the GMA.[9] It states:

> Except as provided in RCW 82.02.050 through 82.02.090, no county, city, town, or other municipal corporation shall impose any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of residential buildings, commercial buildings, industrial buildings, or on any other building or building space or appurtenance thereto,

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[8] *See New Castle Inv. v. City of LaCenter*, 98 Wash.App. 224, 235-36, 989 P.2d 569 (1999) (although impact fees "resembl[e]" taxes, "[w]e do not hold that [they] are taxes"), *review denied*, 140 Wash.2d 1019, 5 P.3d 9 (2000).

[9] Laws of 1990, 1st Ex. Sess., ch. 17 § 42.

> or on the development, subdivision, classification, or reclassification of land.[10]

Given that RCW 82.02.020 bars either a tax or a fee "except as provided in RCW 82.02.050 through 82.02.090," the question here is not whether the City assessed a tax or fee, but whether the City complied with RCW 82.02.050 through RCW 82.02.090.

RCW 82.02.050(2) authorizes impact fees. Enacted as part of the 1990 GMA,[11] it states:

> (2) Counties, cities, and towns that are required or choose to plan under RCW 36.70A.040 are authorized to impose impact fees[12] on development activity[13] as part of the financing for public

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10 (Emphasis added.)

11 Laws of 1990, 1st Ex. Sess., ch. 17 § 43(2).

12 RCW 82.02.090(3) defines "impact fee" as "a payment of money imposed upon development as a condition of development approval to pay for public facilities needed to serve new growth and development, and that is reasonably related to the new development that creates additional demand and need for public facilities, that is a proportionate share of the cost of the public facilities, and that is used for facilities that reasonably benefit the new development."

13 RCW 82.02.090(1) defines "development activity" as "any construction or expansion of a building, structure, or use, any change in use of a building or structure, or any changes in the use of land, that creates additional demand and need for public facilities."

> facilities,[14] provided that the financing for system improvements[15] to serve new development must provide for a balance between impact fees and other sources of public funds and cannot rely solely on impact fees.

RCW 82.02.050(3) caps impact fees. Enacted at the same time as RCW 82.02.050(2),[16] it states that impact fees

> (a) Shall only be imposed for system improvements that are reasonably related to the new development;
>
> (b) Shall not exceed a proportionate share[17] of the costs of system improvements that are reasonably related to the new development; and
>
> (c) Shall be used for system improvements that will reasonably benefit the new development.

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[14] RCW 82.02.090(7) defines "public facilities" as "(a) [p]ublic streets and roads; (b) publicly owned parks, open space, and recreation facilities; (c) school facilities; and (d) fire protection facilities in jurisdictions that are not part of a fire district."

[15] RCW 82.02.090(9) defines "system improvements" as "public facilities that are included in the capital facilities plan and are designed to provide service to service areas within the community at large, in contrast to project improvements." RCW 82.02.090(6) defines "project improvements" in part as "site improvements and facilities that are planned and designed to provide service for a particular development project and that are necessary for the use and convenience of the occupants or users of the project, and are not system improvements."

[16] Laws of 1990, 1st Ex. Sess., ch. 17 § 43(3).

[17] RCW 82.02.090(5) defines "proportionate share" as "that portion of the cost of public facility improvements that are reasonably related to the service demands and needs of new development."

RCW 82.02.050(3)'s cap is ambiguous in at least two ways. First, do the words "the new development" refer to all developments that are new, or only to the permittee's specific development that is new? Second, do the words "reasonably related to" connote a relationship between the system improvements for which fees are imposed and the cumulative impacts of all new development activity, or between the system improvements for which fees are imposed and the individualized impacts of the permittee's specific project? When the cap states that impact fees "[s]hall only be imposed for system improvements that are reasonably related to the new development[,]" it might mean that impact fees must be "reasonably related to" the cumulative impacts of all new development, or it might mean that impact fees must be "reasonably related to" the individualized effects of the specific new development for which a permit is being issued.

When a statute is ambiguous, our task is to ascertain and effectuate legislative intent.[18] To perform that task, we may use both legislative history[19] and the rules of statutory construction.[20] We turn first to legislative history.

House Bill (HB) 2929 was the GMA's precursor. As introduced on January 26, 1990, HB 2929 would have authorized a city to impose impact fees for public improve-

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[18] *Morgan v. Johnson*, 137 Wash.2d 887, 892, 976 P.2d 619 (1999); *Whatcom County v. City of Bellingham*, 128 Wash.2d 537, 546, 909 P.2d 1303 (1996).

[19] *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wash.2d 1, 11-12, 43 P.3d 4 (2002); *In re F.D. Processing, Inc.*, 119 Wash.2d 452, 460, 832 P.2d 1303 (1992).

[20] *Vance v. Dep't of Ret. Sys.*, 114 Wash.App. 572, 577, 59 P.3d 130 (2002), *review denied*, 149 Wash.2d 1028, 78 P.3d 657 (2003); *Parkridge Assoc., Ltd v. Ledcor Indus., Inc.*, 113 Wash.App. 592, 602, 54 P.3d 225 (2002).

ments related either to the individual impacts of a specific project or to the cumulative impacts of all similar projects.[21] As introduced, HB 2929 lacked a cap or limitation like that later incorporated into RCW 82.02.050(3). It stated in part:

> Impact fees may be required to mitigate potential impacts on public facilities and public services . . . arising from development activity that is authorized by the issuance of a permit . . . . *Such impacts could arise from the development activity itself, or the cumulative impact arising from development activity.*[22]

By the time HB 2929 passed the House, it had been amended in committee.[23] But it still did not contain a cap or limitation, and it still would have authorized a city to impose impact fees for public improvements related either to the individual impacts of a specific project or to the cumulative impacts of all similar projects.[24] It stated in part:

> Counties, cities, and towns are authorized to impose impact fees, excise taxes on development activity, or excise taxes on the privilege of engaging in business that constitutes development, to mitigate reasonably related needs for housing relocation impacts and potential impacts on any public facilities

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[21] H.B. 2929, as introduced, 51st Leg., Reg. Sess., § 36(1) (Wash. 1990); HOUSE JOURNAL, 51st Leg., Reg. Sess., at 172-73 (Wash. 1990).

[22] H.B. 2929, as introduced, 51st Leg., Reg. Sess., § 32 (Wash. 1990) (emphasis added).

[23] HOUSE JOURNAL, 51st Leg., Reg. Sess., at 676, 680-81, 684 (Wash. 1990).

[24] ENGROSSED SUBSTITUTE H.B. 2929, 51st Leg., Reg. Sess., § 30(1) (Wash. 1990).

> . . . arising from development activity that is authorized by the issuance of a permit, or other approval, by the county, city, or town. *Such impacts could arise directly or indirectly from the development activity itself or the cumulative impact arising from development activity.*[25]

When HB 2929 reached the Senate, the sponsors of a "striking amendment" proposed to delete the House's language[26] and authorize "the Puget Sound regional growth authority"—but not counties, cities, or towns—to impose impact fees capped at "one percent *of a specific project's* fair market value."[27] During debate on the Senate floor, the sponsor of an amendment to the striking amendment proposed to restore the House's language allowing counties, cities, and towns to base impact fees on either the individual impacts of a specific development or the cumulative impacts of all new development.[28] The amendment to the striking amendment would have stated:

> The legislature intends to assure that taxpayers are no longer unfairly assessed the costs of development of an area by permitting a fair and equitable portion to be assessed through impact fees. It intends to provide for a better base of funding and

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[25] ENGROSSED SUBSTITUTE H.B. 2929, 51st Leg., Reg. Sess., § 30 (Wash. 1990) (emphasis added).

[26] S. AMD. ENGROSSED SUBSTITUTE H.B. 2929, 51st Leg., Reg. Sess. (Wash. 1990); SENATE JOURNAL, 51st Leg., Reg. Sess., at 938 (Wash. 1990).

[27] SENATE JOURNAL, 51st Leg., Reg. Sess., at 1212-13 (Wash. 1990) (emphasis added).

[28] SENATE JOURNAL, 51st Leg., Reg. Sess., at 1233-35 (Wash. 1990).

> for mitigating specifically attributable costs of growth and growth development to the infrastructure of cities, towns, and counties, including but not limited to roads, schools, bridges, parks, and recreational facilities. *Such impacts may arise directly or indirectly from the development activity itself or from the cumulative impact arising from development activity.*[29]

After rejecting this amendment to the striking amendment,[30] the Senate approved the striking amendment itself.[31]

The House refused to concur in the Senate's striking amendment.[32] The two houses then batted the bill back and forth,[33] until finally a free conference committee was appointed.[34] The free conference committee crafted entirely new language, obviously as a compromise, by which it proposed to limit impact fees to those "imposed for system improvements that are reasonably related to *the* new

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[29] SENATE JOURNAL, 51st Leg., Reg. Sess., at 1233 (Wash. 1990) (emphasis added).

[30] SENATE JOURNAL, 51st Leg., Reg. Sess., at 1235 (Wash. 1990).

[31] SENATE JOURNAL, 51st Leg., Reg. Sess., at 1235 (Wash. 1990).

[32] HOUSE JOURNAL, 51st Leg., Reg. Sess., at 1293 (Wash. 1990); SENATE JOURNAL, 51st Leg., Reg. Sess., at 1336 (Wash. 1990).

[33] *See* HOUSE JOURNAL, 51st Leg., Reg. Sess., at 1274, 1380 (Wash. 1990); SENATE JOURNAL, 51st Leg., Reg. Sess., at 1336, 1907 (Wash. 1990).

[34] HOUSE JOURNAL, 51st Leg., Reg. Sess., at 1766 (Wash. 1990); SENATE JOURNAL, 51st Leg., Reg. Sess., at 1336 (Wash. 1990).

development."[35] The new language was reported to both houses on April 1, 1990, and enacted by both houses that same day.[36] It was approved by the governor on April 9, 1990,[37] and codified as RCW 82.02.050(3).

Based on this legislative history, we make three observations. First, we observe that the 1990 legislature, with apparent intentionality, omitted any authorization to impose impact fees for system improvements related to the cumulative impacts of all new development. The House passed a provision authorizing impact fees to mitigate *either* the individualized impacts of a particular new development or the cumulative impacts of all new development. Rejecting the House's provision, the Senate passed one that limited impact fees to "one percent *of a specific project's* fair market value."[38] The free conference committee proposed entirely new language—obviously a compromise—that both houses quickly adopted. The free conference committee had the House provision before it, yet chose to omit any reference to "cumulative impacts." As a consequence, it appears to us that when the 1990 legislature adopted its free conference committee's new language—i.e., when the 1990 legislature said that impact fees "shall only be imposed for system improvements reasonably related to the new development"—it was intending to authorize impact fees "reasonably related" to

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[35] HOUSE JOURNAL, 51st Leg., Reg. Sess., at 1867 (Wash. 1990) (emphasis added); SENATE JOURNAL, 51st Leg., Reg. Sess., at 1919 (Wash. 1990) (emphasis added).

[36] HOUSE JOURNAL, 51st Leg., Reg. Sess., at 1962 (Wash. 1990); SENATE JOURNAL, 51st Leg., Reg. Sess., at 1942 (Wash. 1990).

[37] ENGROSSED SUBSTITUTE H.B. 2929, as enacted, 51st Leg., Reg. Sess., at 82 (Wash. 1990).

[38] SENATE JOURNAL, 51st Leg., Reg. Sess., at 1212-13 (Wash. 1990) (emphasis added).

the individualized impacts of a permittee's specific new development, as opposed to impact fees "reasonably related to" the cumulative impacts of all new development.

Second, we observe that the 1990 legislature, following the recommendation of its free conference committee, chose to preface the words "new development" with the definite article "the." We can readily understand why the legislature would have done that if it were intending to authorize impact fees reasonably related to the particular development of each permittee; but we cannot understand why the legislature would have done that if it were intending, as the House had earlier intended, to authorize impact fees reasonably related to the cumulative impacts of all new development.

Third, we observe that the 1990 legislature, again following the recommendation of its free conference committee, used a phrase, "reasonably related to," that it apparently borrowed from *Nollan v. California Coastal Commission*.[39] Decided in 1987 by the United States Supreme Court, *Nollan* was a case in which the Nollans applied for a permit to build a house on beachfront property. The Coastal Commission granted the permit—but only on condition that the Nollans donate an easement across their beachfront for use as a public trail. The Court held that the Commission's condition was an unconstitutional taking of private property without just compensation because the exacted property (the easement) was for a public improvement (the trail) that was not "reasonably related to" the impacts of the specific project (the Nollans' new house). The Court stated:

> The Commission claims . . . that we may sustain the condition at issue here by finding that it is *reasonably related to* the public need or burden that *the Nollans' new house* creates or to which it

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[39] 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987).

> contributes. We can accept, for purposes of discussion, the Commission's proposed test as to how close a "fit" between the condition and the burden is required, because we find that this case does not meet even the most untailored standards.[40]

Clearly then, the Court used the phrase "reasonably related to" to require a connection or "nexus" between the public problem the Commission wanted to alleviate (the public's lack of access along the beach) and the individualized impacts of the Nollan's *specific* project.

When the 1990 legislature was considering the GMA, it undoubtedly knew about *Nollan*, which was then the *only* case in which the United States Supreme Court had addressed the propriety of conditioning a building permit on the exaction of private property without compensation. Thus, we infer that the 1990 legislature did not use *Nollan's* phrase ("reasonably related to") by coincidence; instead, we think, the legislature used the same phrase with intent to adopt *Nollan's* meaning and assure the new statute's constitutionality. *Nollan* had used the phrase ("reasonably related to") to mean a link or "nexus" between the public problem to be alleviated and the individualized impacts of the permittee's specific project, and we conclude that the 1990 legislature used the same phrase in the same way.

Leaving legislative history, we make two additional observations using the rules of statutory construction. First, a municipality's taxing authority must be express.[41] Such

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[40] 483 U.S. at 838, 107 S. Ct. 3141 (emphasis added).

[41] *Okeson v. City of Seattle*, 150 Wash.2d 540, 78 P.3d 1279, 1288 (2003); *Hillis Homes, Inc. v. Snohomish County*, 97 Wash.2d 804, 809, 650 P.2d 193 (1982).

authority must be denied when in doubt,[42] and construed in the taxpayer's favor when ambiguous.[43] These rules apply not only when deciding whether taxing authority exists in the first place, but also when deciding its limits.[44] As already seen, the cap set by RCW 82.02.050(3) is ambiguous; it might limit impact fees to those reasonably related to the cumulative impacts of all new development, or it might limit such fees to those reasonably related to the individualized impacts of a specific project. Even if RCW 82.02.050(2) authorizes a tax rather than a fee, as the City contends, RCW 82.02.050(3) must be construed in Drebick's favor.

Second, every statute should be construed as constitutional if such a construction is reasonably possible.[45] *Nollan v. California Coastal Commission*,[46] the United States Supreme

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[42] *Okeson*, 78 P.3d at 1289; *Ivy Club Investors Ltd. P'ship v. City of Kennewick*, 40 Wash.App. 524, 528, 699 P.2d 782, *review denied*, 104 Wash.2d 1006 (1985).

[43] *Gould v. Gould*, 245 U.S. 151, 153, 38 S. Ct. 53, 62 L. Ed. 211 (1917); *Simpson Inv. Co. v. Dep't of Revenue*, 141 Wash.2d 139, 149, 3 P.3d 741 (2000); *Group Health Coop. of Puget Sound, Inc. v. Dep't of Revenue*, 106 Wash.2d 391, 401, 722 P.2d 787 (1986); *City of Puyallup v. Pac. N.W. Bell Tel. Co.*, 98 Wash.2d 443, 448, 656 P.2d 1035 (1982); *Dep't of Revenue v. Hoppe*, 82 Wash.2d 549, 552, 512 P.2d 1094 (1973).

[44] *Hoppe*, 82 Wash.2d at 552, 512 P.2d 1094 (construing tax cap); *see Okeson*, 78 P.3d at 1288 (applying tax cap).

[45] *High Tide Seafoods v. State*, 106 Wash.2d 695, 698, 725 P.2d 411 (1986); *State v. Spencer*, 75 Wash.App. 118, 121, 876 P.2d 939 (1994), *review denied*, 125 Wash.2d 1015, 890 P.2d 20 (1995).

[46] 483 U.S. at 825, 107 S. Ct. 3141.

Court case we described above, and *Dolan v. City of Tigard*,[47] a United States Supreme Court case from 1994, are the leading authorities on when it is constitutional to exact property by conditioning a permit. In *Burton v. Clark County*,[48] we analyzed those cases as follows:

> In our view, *Nollan*, *Dolan*, and their Washington progeny stand for at least four propositions. First, when the government conditions a land-use permit, it must identify a public problem or problems that the condition is designed to address. If the government can identify only a private problem, or no problem at all, the government lacks a "legitimate state interest" or "legitimate public purpose[ ]" in regulating the project. Thus, the *Nollan* Court characterized a "condition for abridgement of property rights through the police power" as "a 'substantial advanc[ing]' of a legitimate state interest." The *Dolan* Court said that to evaluate Dolan's takings claim, it had to "determine whether the 'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the city." . . .
>
> Second, the government must show that the development for which a permit is sought will create or exacerbate the identified public problem. This is the same as to say that there must be a relationship (nexus) between the development and the identified public problem; that the necessary relationship will exist if the development will create or exacerbate the identified problem; but that the necessary

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[47] 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

[48] 91 Wash.App. 505, 958 P.2d 343 (1998), *review denied*, 137 Wash.2d 1015, 978 P.2d 1097 (1999).

relationship will not exist if the development will not adversely impact the identified public problem. Thus, the *Nollan* Court rejected an easement that would have improved public access to the beach, even though the Commission's staff report said improved public access was needed, because the Nollans' project, replacing a bungalow with a new house, would not make the identified public problem, lack of public access, any worse than before. Similarly, the *Dolan* court rejected Tigard's exaction of a floodplain easement that would have enhanced the public's recreational opportunities, even though such opportunities were needed, because Dolan's project, a larger retail outlet, would not make the identified public problem, the public's lack of recreational opportunities, any worse than before. These holdings are consistent with the fundamental purpose of the Takings Clause, which is *not* to bar government from requiring a developer to deal with problems of the developer's own making, but which *is* "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

Third, the government must show that its proposed condition or exaction (which in plain terms is just the government's proposed solution to the identified public problem) tends to solve, or at least to alleviate, the identified public problem. In other words, the government must show a relationship (nexus) between the proposed solution and the identified problem, and such relationship cannot exist unless the proposed solution has a tendency to solve or alleviate the identified problem. Thus, the *Nollan* Court rejected the exaction of an easement

along the beach, even though the Nollans' new house would exacerbate the inability of passersby to see the ocean from the road, because allowing people to walk on the beach had no tendency to restore the view from the road. Interestingly, however, the *Nollan* Court would have allowed the exaction of "a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere," because an exaction of that type would have tended to restore the view from the road. The *Dolan* Court likewise rejected the exaction of an easement for a pedestrian/bike path, because the fact-finding administrative tribunal had failed to find that such an easement would have (as opposed to *could* have) a tendency to solve or alleviate traffic congestion. Both cases represent the idea that government acts arbitrarily and irrationally, and thus outside the scope of its police power, when it mandates a solution (i.e., a condition or exaction) that has no tendency to solve the identified problem.

Fourth, the government must show that its proposed solution to the identified public problem is "roughly proportional" to that part of the problem that is created or exacerbated by the landowner's development. . . . [T]he *Dolan* Court posed the question, "[W]hat is the required degree of connection between [1] the exactions imposed by the city and [2] the projected impacts of the proposed development." *It answered by saying that the required connection was a "reasonable relationship" best described by the term "rough proportionality," and that the government "must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."*

> . . . The purpose, once again, is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," while at the same time leaving government free to require a developer to rectify public problems insofar as the developer has created such problems.
>
> When combined, these four propositions boil down to two relationships: a relationship between the project and the identified public problem, and a relationship between the identified public problem and the proposed solution to that problem. . . . The ultimate goal is to show that the proposed condition or exaction (i.e., the proposed solution to an identified public problem) is reasonably related to all or part of an identified public problem that arises from (i.e., is created or exacerbated by) the development project. Unless the government makes this showing, it lacks a "legitimate state interest" or a "legitimate public purpose" in imposing the condition or exaction.[49]

In *Benchmark v. City of Battle Ground*,[50] we held that *Nollan* and *Dolan* apply to an exaction of money as well as to an exaction of land. We said:

> Although the condition exacted here was money, not land, we conclude that the *Dolan* proportionality test applies. . . .

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[49] 91 Wash.App. at 520-24, 958 P.2d 343 (footnotes omitted) (final emphasis added).

[50] 94 Wash.App. 537, 972 P.2d 944 (1999); 103 Wash.App. 721, 14 P.3d 172 (2000), *aff'd on other grounds*, 146 Wash.2d 685, 49 P.3d 860 (2002).

Although *Del Monte Dunes*[51] defines "exactions" as "decisions conditioning approval of development on the dedication of property," we emphasize the similarity of exacting land and money. If the government in *Nollan* and *Dolan* had exacted money rather than land and then purchased land to solve the problems, the same questions would arise: was the money exacted for and used to solve a problem connected to the proposed development? (*Nollan.*) And was the amount of money exacted roughly proportional to the development's impact on the problem? (*Dolan.*) Surely if the issues for an exaction of money are the same as for an exaction of land, the test must be the same: a showing of "nexus" and "proportionality."

We find no inconsistency between this analysis and the comment in *Del Monte Dunes* that *Dolan* was "inapposite." In *Del Monte Dunes*, the developer did not challenge the City's requirement that part of the land be set aside for a public beach, a buffer zone, a view corridor, and butterfly habitat. Rather, the developer claimed that the City did not intend to allow the development under any circumstances and sought to accomplish this goal through over-regulation. Thus, a *Dolan* proportionality analysis was inapposite in *Del Monte Dunes* because the government did not exact land or money.

Further, if the *Dolan* proportionality test does not apply, the government can exact conditions such as the one here with few limits. The condition advances a legitimate state interest—improving the

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[51] *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999).

> public roads. And the condition does not deny the developer all economically viable use of its land. But the condition also seeks to force "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." It is this attempted transfer of a public burden that calls for a *Dolan* proportionality test.[52]

In this case, RCW 82.02.050(2)'s grant of authority to impose impact fees will be constitutional if RCW 82.02.050(3)'s cap on such fees is construed to mean that impact fees must be "reasonably related to" the individualized effects of the particular project. RCW 82.02.050(2)'s grant of authority will not be constitutional if RCW 82.02.050(3)'s cap is construed to mean that impact fees need only be "related to" the cumulative impacts of all new development, irrespective of the individualized impacts of the particular project. So that RCW 82.02.050(2) will be constitutional, we construe RCW 82.02.050(3) as requiring that impact fees be "reasonably related to" the individualized impacts of the particular project.

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[52] 103 Wash.App. at 727-28, 14 P.3d 172 (citations omitted). The City argues that Benchmark is wrong or distinguishable, but we disagree on both counts. We note that one Washington commentator has found Benchmark to be "cogently reasoned," 17 WILLIAM B. STOEBUCK, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW 5.5 (Supp. 2003), while another agreed in principle even before Benchmark was decided. Joseph D. Lee, *Sudden Impact: The Effect Of* Dolan v. City of Tigard *On Impact Fees In Washington*, 71 WASH. L. REV. 205, 221 (1986) (*Dolan* "applies to all development exactions, including impact fees").

The City relies on RCW 82.02.060,[53] and especially RCW 82.02.060(6),[54] for the proposition that impact fees are to be calculated according to the cumulative impacts of all new development, as opposed to the individualized impacts of each new development. In our view, however, RCW 82.02.060's methods of calculation are subject to RCW 82.02.050(3)'s cap. The methods of calculation were in prior bills (though not in precisely the same form), whereas the cap was a last-minute compromise crafted and promulgated by the free conference committee.

The City relies on *New Castle v. LaCenter*[55] for the proposition that the assessment imposed here was a tax that need not be "reasonably related to" the individualized impacts of Drebick's specific project. As already discussed, however, it does not matter whether the assessment imposed here was a

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[53] RCW 82.02.060 states in part that a local ordinance by which impact fees are imposed "[s]hall include a schedule of impact fees which shall be adopted for each type of development activity that is subject to impact fees, specifying the amount of the impact fee to be imposed for each type of system improvement. The schedule shall be based on a formula or other method of calculating such impact fees." This language speaks to the amount to be assessed and collected from each type of development activity for each type of system improvement. It does not, however speak to the amount that any particular project is to pay.

[54] RCW 82.02.060(6) provides that a local ordinance by which impact fees are imposed "[s]hall establish one or more reasonable service areas within which it shall calculate and impose impact fees for various land use categories per unit of development[.]" Except for "impact fees," the legislature did not define any of these terms. Given that RCW 82.02.060 is subject to the cap in RCW 82.02.050(3), we need not wrestle with the meaning of these terms.

[55] 98 Wash.App. at 224, 989 P.2d 569.

tax or a fee. Either way, it must comply with RCW 82.02.050 through 82.02.090,[56] including the cap in RCW 82.02.050(3).[57]

The City relies on *Wellington River Hollow v. King County*,[58] but that case is distinguishable. The question there was whether a municipality had complied with the requirements of its own ordinance. The question here concerns the requirements of state law.

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[56] RCW 82.02.020.

[57] We do not overlook the following dictum in *New Castle*: "Although impact fees must be 'reasonably related' to the impact of new development on the public infrastructure, they are not individually calculated for each new development, but rather are based on a general calculation that applies to all new development." 98 Wash.App. at 234, 989 P.2d 569. This statement was not necessary to our decision and is not binding precedent. *DCR, Inc. v. Pierce County*, 92 Wash.App. 660, 683, n.16, 964 P.2d 380 (1998) ("Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed.") (quoting *State v. Potter*, 68 Wash.App. 134, 150, 842 P.2d 481 (1992)), *cert. denied*, 529 U.S. 1053, 120 S. Ct. 1553, 146 L. Ed. 2d 459 (2000); *Concerned Coupeville Citizens v. Town of Coupeville*, 62 Wash.App. 408, 416, 814 P.2d 243, *review denied*, 118 Wash.2d 1004, 822 P.2d 288 (1991). In any event, this statement is consistent with today's ruling once it is understood that the "general calculation" is made pursuant to RCW 82.02.060, and that RCW 82.02.060 is subject to the cap in RCW 82.02.050(3). *New Castle* did not concern a cap, much less the relationship between a cap and RCW 82.02.060's methods of calculation.

[58] 113 Wash.App. 574, 54 P.3d 213 (2002), *review denied*, 149 Wash.2d 1014, 70 P.3d 965 (2003).

Relying on RCW 64.40.020,[59] Drebick requests costs and reasonable attorney fees. He has not met the predicates of that statute, so we deny his request.[60]

In conclusion, we reverse the superior court and remand for the City to impose an impact fee using any of the methods in RCW 82.02.060, provided that such fee shall not exceed the individualized impacts of Drebick's specific project.

/s/ Morgan, J.
Morgan, J.

We concur:

/s/ Seinfeld, J.
Seinfeld, J.

/s/ Hunt, C.J.
Hunt, C.J.

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[59] RCW 64.40.020 provides in part:

> (1) Owners of a property interest who have filed an application for a permit have an action for damages to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority, or relief from a failure to act within time limits established by law: PROVIDED, That the action is unlawful or in excess of lawful authority only if the final decision of the agency was made with knowledge of its unlawfulness or that it was in excess of lawful authority, or it should reasonably have been known to have been unlawful or in excess of lawful authority.
>
> (2) The prevailing party in an action brought pursuant to this chapter may be entitled to reasonable costs and attorney's fees.

[60] This ruling is limited to costs on fees on appeal and does not affect proceedings stayed below.

Appendix D–1

FILED NOV. 09, 2001

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

CITY OF OLYMPIA, Petitioner, v. JOHN DREBICK and JOHN DOE DREBICK, husband and wife, d.b.a. DREBICK INVESTMENTS, Respondents.	)	No. 00-2-02152-3 FINAL JUDGMENT
JOHN DREBICK and JANE DOE DREBICK, husband and wife, d.b.a. DREBICK INVESTMENTS, Counter-Petitioners, v. CITY OF OLYMPIA, Counter-Respondent.	)	

THIS MATTER having come before the Court for trial of the Land Use Petition Act appeals filed by the City of Olympia and by John Drebick, d.b.a. Drebick Investments, from the

decision of the City of Olympia's Hearing Examiner of November 2, 2000. The court rendered a written decision on the Land Use Petition Act claims on June 28, 2001 and issued findings of fact and conclusions of law, which are being entered in conjunction with this Final Judgment and are incorporated herein by reference. Given decision on the Land Use Petition Act claims, the parties have agreed to dismiss the remaining claims asserted by Drebick with prejudice.

Therefore, based on the Court's written decision, its findings of fact and conclusions of law, and the stipulation of the parties as to the remaining claims,

It is hereby ADJUDGED, ORDERED AND DECREED that:

1. The Land Use Petition of the City of Olympia is GRANTED.
2. The Land Use Petition of John Drebick is DENIED.
3. The decision of the Hearing Examiner is REVERSED insofar as it set aside the impact fees initially computed by the City of Olympia and AFFIRMED in all other respects.
4. The transportation impact fee for Drebick as derived from Olympia Municipal Code and imposed by the City in the adjusted amount of $132,328.98 is hereby REINSTATED.
5. The remaining claims and counterclaims of Drebick raised in his Answer are DISMISSED WITH PREJUDICE.

DONE IN OPEN COURT this 9th day of November, 2001.

CHRISTINE A. POMEROY
JUDGE

Presented by:

CITY OF OLYMPIA

By /s/ John Vanek
John Vanek, WSBA # 5386
Assistant City Attorney for Petitioner/
Counter Respondent, City of Olympia

PRESTON GATES & ELLIS LLP

By /s/ David J. Lenci
David J. Lenci, WSBA # 7688
Attorneys for Petitioner/Counter-Respondent
City of Olympia

Approved as to Form;
Approved for Entry:

PERKINS COIE

By /s/ Alexander W. Mackie
Alexander W. Mackie, WSBA # 6404
Attorney for Respondents/Counter Petitioners
John and Glenda Drebick and Drebick Investments

Appendix D–4

FILED NOV. 09, 2001

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

CITY OF OLYMPIA, Petitioner, v. JOHN DREBICK and JOHN DOE DREBICK, husband and wife, d.b.a. DREBICK INVESTMENTS, Respondents.	)	No. 00-2-02152-3 FINDINGS OF FACT AND CONCLUSIONS OF LAW
JOHN DREBICK and JANE DOE DREBICK, husband and wife, d.b.a. DREBICK INVESTMENTS, Counter-Petitioners, v. CITY OF OLYMPIA, Counter-Respondent.	)	

THIS MATTER came before the above-entitled Court for trial of land use petition act appeals filed by the City of Olympia and by John Drebick, dba Drebick Investments, from

the decision of the Hearing Examiner of the City of Olympia rendered on November 2, 2000. The City of Olympia appeared by and through its attorneys of record, David J. Lenci, John Vanek and Jeffrey S. Myers. Drebick appeared by and though its attorney of record, Alexander W. Mackie.

The Court having considered the record before the Hearing Examiner below, the briefs and written submissions of the parties and the argument of counsel, together with the court file herein, issued a written decision on June 28, 2001. A copy of that decision is attached hereto and adopted and incorporated herein by reference. Based upon the foregoing and to the extent not inconsistent with this Court's written decision, the following findings of fact and conclusions of law are hereby entered:

I. FINDINGS OF FACT

1. The findings of the Hearing Examiner contained in his decision issued on November 2, 2000, will not be disturbed, except as otherwise found herein.

2. Findings 39 and 40 are vacated pursuant to RCW 36.70C.130(1)(d). The Hearing Examiner erred by applying an incorrect legal interpretation in determining whether the impact fees in question satisfy the requirements of RCW 82.02.050. The Hearing Examiner's determinations that there is no reasonable benefit to the Drebick project and that the impact fees are not proportionate to or reasonably related to the Drebick project constitute a clearly erroneous application of the law to the facts.

II. CONCLUSIONS OF LAW

1. The City of Olympia's Transportation Impact Fee Ordinance OMC § 15.06.010, et seq., was enacted and implemented by the Olympia City Council in its legislative capacity pursuant to the authority conferred by the Growth Management Act, RCW Ch.82.02.

2. The fees imposed by the City of Olympia pursuant to its Transportation Impact Fee Ordinance are in the nature of excise taxes intended to raise revenue, and are not regulatory fees.

3. The Growth Management Act requires that transportation impact fees, such as those at issue here: (1) only be imposed for system improvements that are reasonably related to the new development; (2) not exceed a proportionate share of the costs of system improvements that are reasonably related to the new development; and (3) be used for system improvements that will reasonably benefit the new development.

4. The standard for analyzing the legality of these general impact fees under the Growth Management Act is broader than the standards used to evaluate direct impact fees allowed under the State Environmental Policy Act, RCW Ch. 43.21C, or the Local Transportation Act, RCW Ch. 39.92.

5. Although general impact fees imposed under RCW 82.02.050 must be "reasonably related" to the impact of new development on the public infrastructure as a whole, they are not independently determined by the specific impacts of each new project that forms a part of the new development, but rather are based upon an analysis of the impacts of the new development upon the City's need for additional capital facilities to serve such new development contemplated by the City's comprehensive plan within the relevant service area.

6. The City Council of Olympia was authorized to assess and impose the transportation impact fees at issue here on a "citywide" system basis.

7. The fees assessed against the Drebick project are proportionate to and reasonably related to the City's jurisdiction-wide need for new transportation improvements necessitated by new development, including the Drebick project.

8. The Hearing Examiner erred by failing to accord proper deference to the legislative decision of the Olympia City Council in enacting and implementing the Transportation Impact Fee Ordinance pursuant to the Growth Management Act and in providing a methodology to determine the fees to be imposed under that Ordinance.

9. The Hearing Examiner exceeded the scope of his authority by invalidating the City's legislatively-adopted Transportation Impact Fee Ordinance under an "as applied" analysis of the transportation impact fee to be imposed on Drebick's proposed project.

10. The Hearing Examiner's conclusions that the fees imposed on Drebick's project violated the Growth Management Act were clearly erroneous and an improper application of the law.

11. As independent grounds for reversing his decision, the Hearing Examiner exceeded his authority as governed by the Olympia Municipal Code.

12. While the Hearing Examiner properly concluded that there were no specific unique or unusual characteristics of the Drebick project that warranted an independent fee calculation, his conclusion that the fees imposed under the ordinance in question were inconsistent with principles of fairness was clearly erroneous and an improper application of the law.

13. As for the Drebick appeal of the Hearing Examiner's decision, the use by the City of Olympia of a six-year period in computing the transportation impact fee for the Drebick project complies with the reasonable relationship and proportionality requirements of the Growth Management Act. See RCW 82.02.050(3) and RCW 82.020.090(5). The conclusions to that effect by the Hearing Examiner are proper and will not be disturbed.

14. The Transportation Impact Fee of $132,328.98 was properly assessed against and imposed upon the Drebick project.

DONE IN OPEN COURT this 9th day of November, 2001.

CHRISTINE A. POMEROY
JUDGE

Presented by:

CITY OF OLYMPIA

By /s/ John Vanek
John Vanek, WSBA # 5386
Assistant City Attorney for Petitioner/
Counter Respondent, City of Olympia

PRESTON GATES & ELLIS LLP

By /a/ David J. Lenci
David J. Lenci, WSBA # 7688
Julie Anne Halter,
Attorneys for Petitioner/Counter-Respondent
City of Olympia

Approved as to Form;
Approved for Entry:

PERKINS COIE

By /s/ Alexander W. Mackie
Alexander W. Mackie, WSBA # 6404
Attorneys for Respondents/Counter Petitioners
John and Glenda Drebick and Drebick Investments

FILED JUN 28, 2001

Superior Court of the State of Washington
For Thurston County

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June 28, 2001

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Letter Opinion

Re: *City Of Olympia vs. John Drebick et ux,.*
Thurston County Cause No. 00-2-02152-3

Dear Counsel:

This case came before the Court for trial on the Petition of the City of Olympia and the Counter-Petition of John Drebick, seeking review pursuant to the Land Petition Act

RCW Ch. 36.70 (c) ("LUPA"), both sides seeking review of the Hearing Examiner's decision on different issues pertaining to the proper amount of City of Olympia's transportation impact fee imposed on a new office building being constructed by Drebick Investments.

The Court finds this fee to be a "general impact" fee as defined by the Growth Management Act (GMA) and is not a direct regulatory fee. As defined in *New Castle Investments v. City of La Center*, 98 W, App. 224, 235, 989 P.2d 569 (1999) these fees are analogous to taxes and intended to raise revenue and are not regulatory of the specific project. The Court finds that the Olympia City Council was acting in their legislative capacity and was authorized to assess such tax and could impose it on a "citywide" system basis. The Court reverses the hearing examiners decision in requiring the City of Olympia to provide a proportional nexus to the project in order to assess this fee. The Court finds the holding of the Hearing Examiner to be clearly erroneous and outside his authority as governed by the ordinance and the GMA.

The GMA requires that the City of Olympia transportation impact fee must (1) only be imposed for system improvements that are reasonable related to the new development; (2) not exceed a proportionate share of the costs of systems improvements that are reasonably related to the new development; and (3) be used for system improvements that will reasonably benefit the new development.

This Court finds that this "rational" standard to be broader than the standard under the State Environmental Policy Act (SEPA) or the Local Transportation Act (LTA) and the evidence establishes this broader "relational" standard.

This Court finds that the City of Olympia Transportation Impact Fee Ordinance OMC § 15.04.010 meets all the criteria outlined in the GMA RCW 82.02 when the city adopted these

fees and specifically that the City's use of the six year Capital Facilities Plan (CFP) is valid.

The Court will uphold the Hearing Examiners finding that there are no unique or unusual circumstances to warrant a deviation from the schedule. Therefore, the director's decision on imposing the entire $132,328.98 in tax assessment for this project will be imposed.

I will sign a Findings of Fact and Conclusions of Law upon presentation of an Order consistent with this ruling.

Sincerely,

/s/ Christine A. Pomeroy
Christine A. Pomeroy
Judge

CAP:jek

Appendix E–1

FINDINGS AND DECISION OF THE HEARING EXAMINER OF THE CITY OF OLYMPIA

CASE NO:

Administrative Appeal No. 98-0059 (Appeal of decision of Director)

APPELLANT:

Drebick Investments
2404 Chandler Court SW
Suite 200
Olympia, WA 98502-6034

APPLICANT:

Drebick Investments
2404 Chandler Court SW
Suite 200
Olympia, WA 98502-6034

SUMMARY OF REQUEST:

This is an appeal of the decision of the Director of the Community Planning and Development Department, issued May 7, 1999, which denied the Appellant's request for an independent fee calculation in the determination of transportation impact fees for a commercial office building.

LOCATION OF PROPOSAL:

The office building at issue is located at 2425 Bristol Court SW in Olympia, on Assessor's Parcel No. 46790005600.

SUMMARY OF DECISION:

The decision of the Director of the Community Planning and Development Department is affirmed in part and reversed in part.

HEARING AND RECORD:

The hearing on this appeal was held before the undersigned Hearing Examiner on May 15, June 12, June 13, and June 22, 2000.

At the hearing, the following individuals testified under oath:

John Drebick
2404 Chandler Court SW
Suite 200
Olympia, WA 98502-6034

Perry Shea, Transportation Engineer
SCA Engineering
677 Woodland Square Loop
Lacey, WA

Todd Stamm, Associate Planner for the City of Olympia
Community Planning and Development Department
837 7th Avenue S.E., P.O. Box 1967
Olympia, WA 98507

Donald R. Samdahl, Transportation Engineer
Mirai Associates Inc.
19110 Bothel Way NE, Suite 202
Bothel, WA 98011

David Smith, Transportation and Traffic Engineer
Olympia Public Works Department
837 7th Avenue S.E., P.O. Box 1967
Olympia, WA 98507

Randy Wesselman, Transportation Engineering Supervisor
Olympia Public Works Department
837 7th Avenue S.E., P.O. Box 1967
Olympia, WA 98507

At the hearing. the following exhibits were admitted as part of the official record of these proceedings:

Exhibit 1. Staff Report by Olympia Community Planning and Development Department for Administrative Appeal No. 98-0059, prepared by Todd Stamm. This Exhibit includes the 15 page Staff Report and Attachments A through L, identified on Page 15 of the Staff Report.

Exhibit 2. Letter dated May 11, 2000 from David Merchant to Thomas R. Bjorgen, with attachment.

Exhibit 3. Attachments 1-6 to the letter of September 17, 1999 from Alexander W. Mackie to Thomas R. Bjorgen.

Exhibit 4. Notebook entitled "Drebick Investments - Bristol Court Office Building - Appeal of Impact Fee Review Decision of May 7, 1999 - Appellant's Exhibits for Hearing" and marked as Ex. 4.

Exhibit 5. Map 6-3 from the Olympia Comprehensive Plan, labeled Transportation 2015.

Exhibit 6. Institute of Transportation Engineers Trip Generation Manual, 5th Edition.

Exhibit 7. Institute of Transportation Engineers Trip Generation Manual, 6th Edition.

Exhibit 8. Overhead transparency of Base Year Network Zone 228.

Exhibit 9. Olympia Urban Growth Area Map dated January 22, 1999.

Exhibit 10. Notebook entitled on its first page as "City of Olympia Exhibits - Drebick Investments - Bristol Court Office Building - Appeal of Impact Fee Review Decision of May 7, 1999" and marked as Ex. 10; except that to the extent they express a legal opinion, Tab 4, p. 12, fourth bullet, Tab 4, p. 16, and Tab 4, p. 18 are not admitted.

Exhibit 11. Graph showing weighted average and linear regression methods of estimating traffic trips and marked as Ex. 11, except the black line in a stair-step configuration to the right of the vertical line extending up from 54,000 is not admitted.

Exhibit 12. Hand drawn illustration of the Heritage, Chandler and Bristol cul-de-sacs.

Exhibit 13. No exhibit 13 was admitted.

Exhibit 14. Diagram and text marked "Project Components" (sic) and marked as Ex. 14.

Exhibit 15. Table entitled "Sample List - Oversizing of CIP Projects for 6-year Growth Increment" and marked as Ex. 15 with the following modification: the first entry in the Column marked "Limit" is changed to read "Cooper Point Road to Yauger Way".

After consideration of the testimony and exhibits described above, the Hearing Examiner makes the following findings of fact, conclusions of law, and decision.

FINDINGS OF FACT

I. General Findings

1. On July 31, 1998, Drebick Investments (Drebick) submitted an application for land use approval for a new office building to be constructed at 2425 Bristol Court in Olympia. No contention is raised that the application was incomplete in any way. Land use approval is the principal regulatory approval which the proposal was required to obtain under City zoning and land use regulations.

2. The proposed office building is located in the Evergreen Park PUD zoning district and has four stories. The record indicates its square footage is 54,698.

3. Land use approval was initially granted by the City on December 14, 1998. Revised land use approvals were issued on January 5, 1999 and February 23, 1999.

4. On January 27, 1999, Drebick submitted a complete application for a building permit for this project. The building permit was issued on May 20, 1999. At the time of the hearing on this matter, construction of the building was nearing completion.

5. Through Olympia Municipal Code (OMC) Chapters 15.06, 15.10, 15.14 and 15.18, the City imposes transportation impact fees on proposals such as this. The land use approvals for this project contained a condition requiring the payment of these transportation impact fees. The land use approvals estimated that the impact fee for this proposal would be $125,500. The later decision of the Director of the Community Planning and Development Department here on appeal found that the transportation impact fee for this building would be $161,359.10. (Ex. 1, Att. I). However, the staff report for this appeal indicates that the City subsequently accepted a transportation impact fee payment of $132,328.98 from Drebick for this project. (Ex. 1, p. 7).

6. Olympia's transportation impact fees are imposed under the authority of RCW 82.02.050 et seq. According to RCW 82.02.060, local ordinances which assess impact fees

> "(4) Shall allow the county, city, or town imposing the impact fees to adjust the standard impact fee at the time the fee is imposed to consider unusual circumstances in specific cases to ensure that impact fees are imposed fairly;
>
> (5) Shall include a provision for calculating the amount of the fee to be imposed on a particular development that permits consideration of studies and data submitted by the developer to adjust the amount of the fee . . ."

7. Olympia has complied with this requirement through the adoption of OMC 15.10.020. Subsection A of that section authorizes the Community Planning and Development Department, sua sponte, to conduct an independent fee calculation if, in the Director's judgment, "none of the fee categories or fee amounts set forth in [the ordinance] accurately describes or captures the impacts of a new development on transportation . . ." Subsections B, C and D allow a feepayer to submit an independent fee calculation to the Director. The Director may then "adjust the impact fees on a case-by-case basis based on the independent fee calculation, the specific characteristics of the development, and/or principles of fairness." These standards are discussed in more detail in the Conclusions of Law, below.

8. Pursuant to OMC 15.10.020, Drebick requested an independent fee calculation for this proposal by letter dated February 25, 1999, found at Ex. 1, Att. G. This request proposed three different methods of calculating transportation impact fees for this project. First, it proposed multiplying $966.00, representing the average cost of new afternoon peak hour trips, by 81, representing the number of new afternoon

peak hour trips generated by the project, for a total fee of $78,246.00. Second, it proposed a fee of zero, arguing that the definitions of the Olympia ordinance precluded impact fees for transportation facilities. Third, it proposed a transportation impact fee of $29,638.00 for this project; based on the traffic impact fee calculation prepared by Perry Shea of SCA Engineering, dated February 26, 1999, and found at Ex. 1, Att. H. This last calculation is occasionally referred to in the record as Shea-1.

9. Mr. Drebick's claim that the Olympia ordinance does not authorize any impact fees for transportation facilities is based on the fact that its definition of "public facilities" codified at OMC 15.06.020 CC does not include streets or roads. However, Ex. 1, Att. L contains a certified copy of Ordinance 5508, which adopted the provisions of OMC Title 15 authorizing the collection of transportation impact fees. That ordinance, in Sec. 2, Part AB, defines public facilities expressly to include "public streets and roads". No evidence was submitted suggesting that this has been amended. Thus, the definition on which Mr. Drebick relies is the result of an error in codification. The codifier has no authority to amend an adopted ordinance. Therefore, the Olympia ordinance does impose transportation impact fees. For this reason, Mr. Drebick's proposed fee of zero is rejected. At the hearing, Mr. Drebick testified that the remedy he is requesting is the transportation impact fee of $29,638.00, as set forth in Shea-1. Thus, Mr. Drebick's alternative request for a fee of $78,246.00 is deemed abandoned.

10. By letter dated May 7, 1999, the Director of the Community Planning and Development Department denied Drebick's request for an independent fee calculation. See Ex. 1, Att. I. The Director found that the request used an improper basis for determining the number of trips which the project would generate and improperly spread the cost of traffic improvements over all, traffic that would use the traffic

improvement, and not the increase in traffic which made the improvement necessary. The Director also found that Drebick had not submitted any information showing that the proposed office is of a unique character or has a mix of uses which justifies an independent fee calculation. The Director concluded that the "feepayer's methodology fails to meet the accuracy and reliability criteria set forth at OMC 15.10.020 (D), and cannot be accepted."

11. On May 21, 1999, Drebick filed a timely appeal of the Director's decision to the Hearing Examiner, as authorized by OMC 15.10.080.

II. The City's general method of calculating impact fees and its application to the Drebick proposal.

12. Effective April 17, 1995, the City adopted Ordinance No. 5508, which added new chapters to Title 15 of the OMC imposing impact fees under the authority of RCW 82.02.050 et seq. This ordinance also incorporated the Transportation Impact Fee Rate Study prepared for the City by JHK Associates and dated March 29, 1995. This study is found at Ex. 1, Att. A in this record.

13. Effective March 15, 1999, the City amended OMC 15.06.020 and 15.18.010 relating to transportation impact fees. This amendment repealed the incorporation of the 1995 Transportation Impact Fee Rate Study and incorporated instead the Transportation Impact Fee Rate Study City of Olympia Addendum, dated February 25, 1999.

14. Drebick submitted a complete application for land use approval on July 31, 1998. Drebick submitted a complete application for a building permit for this project on January 27, 1999. Mr. Drebick testified that he received a vesting notice from the City that its application for a building permit was complete as of January 27, 1999. As held in Part III of the Conclusions, below, the Drebick proposal should be considered

under Ordinance No. 5508 and the incorporated Transportation Impact Fee Rate Study of March 29, 1995.

15. The calculation of impact fees under the 1995 Ordinance and Study proceeds through a number of steps. First, the City identified those transportation improvement projects in its Capital Facilities Plan (CFP) which were needed during the six-year period from 1994 to 2000 to meet adopted level of service (LOS) standards. These improvements are referred to as "capacity improvements" in the 1995 Ordinance and Study and consist of ten project groups. Not all of the ten project groups, however, are included in the impact fee program. See Ex. 1, Att. A, p. 10. All references to "project groups" or "project improvement groups" in this decision are to those project groups included in the impact fee program. The total cost of these project improvement groups was estimated in the 1995 Study to be $18,856,770.

16. The 1995 Study then eliminated from this list those projects which were needed to remedy existing deficiencies in the City's transportation system. The eliminated projects were those on facilities with an existing LOS which was below the City's adopted standard. The resulting list, therefore, included those improvements needed to meet the demands of new growth during the six-year period from 1994 to 2000. The total cost of these improvements was estimated in the 1995 Study at $17,988,000.

17. The 1995 Study then subtracted from this $17,988,000 figure $7,370,000 which was projected to be available from various grants and $1,075,000 which was projected from other City funds, which resulted in a figure of $9,543,000.

18. This figure of $9,543,000 was then further reduced by the expected amount of traffic with both a point of origin and destination outside of the Olympia Urban Growth Area

(UGA).[1] This class of trips is referred to in the record as "pass-through traffic". The 1995 Study accomplished this reduction by estimating the percentage of trips traveling through each project group which would have one or both trip ends in the UGA. These percentages are shown in Ex. 1, Att. 1, Table 2. The overall percentage of 96.2 was then applied to the figure of 9,543,000 for a product of $9,178,932.

19. This figure of $9,178,932 represents the estimated cost of the transportation improvement projects in the UGA needed to provide capacity for new growth over the applicable six-year period, after subtracting the cost of improvements to address existing deficiencies, the percentage of traffic representing pass-through traffic, and funds expected from grants and various other sources. This figure was developed consistently with legal standards and customary practice. It is a reasonable projection of the described costs.

20. The City of Olympia has developed a computer model to predict the pattern and volumes of traffic in the future. In the model, the City is divided into 450 to 500 traffic analysis zones (TAZ). For each such zone, the model considers the Comprehensive Plan designation and the expected population, the number of employees and the number of residential units over a 20 year period. From this, the model is able to estimate the number and timing of trips entering and leaving each TAZ.

21. The model uses 1998 as its base year and assumes that during the following six years the existing and committed transportation network will be present. This represents all transportation facilities which exist or which have funding guaranteed to build them within this six-year period.

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[1] Unless otherwise noted, all references to the UGA include both the incorporated area of the City of Olympia and the unincorporated area designated as part of the Olympia UGA under RCW 36.70A.110.

22. The model then projects the number and distribution of trips among the various TAZ's by assuming that drivers will take the shortest trip to a destination. Thus, as traffic conditions deteriorate on certain streets or improve on others, the model will redistribute trips to assure the shortest trip among the TAZ's.

23. The model does not predict the volume and distribution of traffic from specific developments. Rather, it predicts the changing routes and volumes of traffic among the TAZ's. Stated another way, it distributes trip ends and routes among the TAZ's.

24. In the calculation of impact fees under Olympia's ordinance, the model is used to project the amount of "pass-through" traffic eliminated from consideration as described in Finding 18 and to project the number of new trips generated overall in the UGA during the applicable six-year period.

25. The figure of $9,178,932, described in Findings 15 through 19, was divided by the total number of new, afternoon peak-hour trips projected in the UGA during the six-year period from 1994 to 2000. This resulted in the conclusion that the average, UGA-wide cost of a new trip was $966. These calculation are schematically shown on Ex. 1, Att. 1, Figure 6.

26. This average, UGA-wide cost of a new trip was then convened to the impact fee rate schedule found at Ex. 1, Att. 1, Table 5 through a number of additional steps. First, the City's method used in this case takes trip generation rates for different types of land uses from the Institute of Transportation Engineers (ITE) Trip Generation Manual, 5th Edition. These rates are expressed as the number of vehicle trips entering or leaving a property during the afternoon peak hour. For commercial-administrative office buildings, these rates are listed under the "Basic Rate" column in Ex. 1, Att. 1, Table 3 in terms of vehicle trips per 1000 square feet of gross floor area.

27. Next, these trip rates are reduced to eliminate "pass-by" trips, trips which are already passing by the property and which turn in to use it. "Pass-by" trips, in other words, are not caused or generated by the development for which impact fees are being calculated. Therefore, they should not be counted in the calculation of these fees. The reduction of the trip generation rate to account for "pass-by" traffic is accomplished through application of the "New trips %" shown in Ex. 1, Att. 1, Table 3.

28. Finally, the trip generation rates are adjusted to account for the varying trip lengths generated by different land uses. The average trip length for the UGA was estimated at 3 miles. The City's method then uses limited national survey results to estimate trip lengths for different types of land uses. For each type of land use, the estimated trip length was divided by the average length of 3 miles to derive the "trip length adjustment factor" shown in Ex. 1, Att. 1, Table 3. Each trip generation rate, after elimination of "pass-by" traffic, was multiplied by this factor to account for varying trip length.

29. The resulting trip rates for the various land use types, adjusted for trip length and "pass-by" traffic, were multiplied by $966, the average cost of a new trip in the UGA as explained above. This resulted in the total cost of the transportation improvement projects in the UGA needed to provide capacity for new growth over the applicable six-year period attributable to each land use type per the unit of measurement used. As noted, the unit of measurement for commercial-administrative office buildings is 1000 square feet of gross floor area. Thus, the resulting figure was divided by 1000 to obtain the cost per square foot of gross floor area. This is the impact fee rate adopted by the City in Ex. 1, Att. 1, Table 5 for various sizes of commercial-administrative office buildings.

30. Under this process, the impact fee rate for commercial administrative office buildings with 50,000 to

99,999 square feet of gross floor area is $2.95 per square foot. See Ex. 1, Att. 1, Table 5. After the subtraction of certain credits which are not here at issue, this resulted in the impact fee of $132,328.98 which the City imposed on the Drebick development.

31. In general, the transportation impact fees assessed through this method pay for about one-half of the facilities needed to accommodate new growth.

32. The heart of the City's method of calculating and assessing transportation impact fees may be summarized in four steps:

> (a) Project the cost of the transportation improvement projects in the UGA needed to provide capacity for new growth over the six-year period from 1994 to 2000. This estimate does not include the cost of improvements to address existing deficiencies and has been reduced to account for the percentage of pass-through traffic and funds expected from grants and various other sources.
>
> (b) Project the total number of new, afternoon peak-hour trips with at least one end in the UGA during the same six-year period.
>
> (c) Divide the projected cost from (a) by the projected number of trips in (b) for the average cost of a new trip in the UGA over the six-year period.
>
> (d) Convert this average cost into impact fees for specific types and sizes of development by considering the number of vehicle trips entering or leaving the land use at issue during the afternoon peak hour, the varying trip lengths generated by different land uses, and the percentage of "pass-by" trips.

33. Mr. Samdahl, the City's traffic consultant, testified that in his opinion the use of a jurisdiction-wide average cost as the basis for the impact fee rates was justified, because the City's relatively compact geography matched closely with the average trip lengths, such that in most cases an average trip would traverse a good portion of the City boundaries.

34. Under the method used by Olympia to calculate transportation impact fees, the impact fee assessed a specific development is proportionate to and reasonably related to the jurisdiction-wide need for new transportation improvements created by that development.

35. Every land use benefits in a general sense from a smoothly functioning transportation system with adequate capacity in the jurisdiction in which it is located. Under Olympia's method the transportation impact fee assessed a specific development is used for improvements that will reasonably benefit that development, if benefit is judged by the effect of the transportation improvements in the jurisdiction as a whole.

36. Under Olympia's method, a transportation impact fee does not depend on or vary with the location within the City of the development charged. The fee does not depend on or take into account whether the development charged actually contributes any trips to any of the project groups on which the fee is based.

37. Under Olympia's method, a transportation impact fee assessed a specific development may be based on the cost of projects to which that development will contribute no traffic and which will not directly benefit that development. Under Olympia's method, a development contributing no traffic to any of the project groups on which the transportation impact fees are based would be charged the same impact fee as the same type and size development which did contribute traffic to those project groups.

38. The independent fee calculation proposed by Mr. Drebick, along with the City's criticisms of its method, are discussed in detail in the Findings below. Even if each of the City's criticisms is accepted, the independent fee calculation shows that the Drebick proposal will contribute a minuscule amount of traffic to some of the projects funded by impact fees, such as Fones Road and the intersection of Sleater-Kinney and Martin Way, and a large amount to others, such as the intersection of Cooper Point Road and Evergreen Park Drive. See Ex. 10, Tab 5, Column B1. Under the City's method, Drebick is assessed the same transportation impact fee as a similar development which contributed no traffic to the intersection of Cooper Point Road and Evergreen Park Drive and large amounts to Fones Road and the intersection of Sleater-Kinney and Martin Way.

39. Under Olympia's method, the transportation impact fee assessed the Drebick proposal is not proportionate to or reasonably related to the service demands or needs created by the Drebick proposal on each of the individual project groups on which the impact fees are based.

40. The only manner in which the Drebick proposal could be benefitted by specific transportation improvement projects it will not use, considered individually, is if those improvements relieved traffic pressure on other links used by the Drebick proposal or if they improved emergency response to the Drebick proposal. No evidence was submitted showing this for any of the individual improvements. Under Olympia's method, the transportation impact fees assessed the Drebick proposal may be used for individual transportation facilities which do not reasonably benefit the Drebick proposal.

41. The Drebick proposal is not unique or unusual in its location or as a traffic generator, especially in contrast to other projects for which Olympia has accepted an independent fee calculation. There are no specific characteristics of the Drebick

proposal which suggest the transportation impact fees proposed by Olympia should be adjusted. Finding No. 6 of the Director's decision. Ex. 1, Att. I, states that the information submitted does not show that the Drebick proposal is of a unique character or has a mix of uses which justifies an independent fee calculation. This finding is supported by substantial evidence in the record.

III. The method of calculating impact fees proposed in Drebick's independent fee calculation.

42. As noted, the independent fee calculation proposed by Mr. Drebick is found at Ex. 1, Att. H. This independent fee calculation began by projecting the number of trips which the Drebick project would contribute to the various project groups on which the Drebick impact fees are based. This was done by identifying the TAZ in which the Drebick project is located, TAZ 228, and examining the routes which the City's traffic model predicts the trips into and out of that TAZ will take. The independent fee calculation first determined the total number of afternoon peak hour trips either to or from TAZ 228. It then determined the number of trips either to or from TAZ 228 which would cross each of the project group improvements. It then calculated the percentage of the total traffic into or out of TAZ 228 represented by trips that would cross each project group. Assuming that this percentage would be constant for each traffic generator within TAZ 228, the independent fee calculation applied the percentage generated for each project group to the 81[2] afternoon peak hour trips generated by the Drebick proposal. See Testimony of Perry Shea, May 15, 2000, pp. 134-35. This resulted in the projected number of Drebick trips on each project group link, as shown in Column B of the independent fee calculation table in Ex. 4, Tab 5. The calculation did not use the results of a survey of actual drivers in making this projection.

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[2] The proper number should be 98, as discussed below.

43. The independent fee calculation then determined the total 2004 traffic on each project group link, assuming completion of the existing and committed network, and calculated the percentage of that total traffic on each project group link represented by the projected number of Drebick trips on that link. See Ex. 4, Tab 5 and Ex. 10, Tab 9. That percentage was then applied to the cost of each project group derived from Ex. 1, Att. 1, for Drebick's proposed share of the costs of each project group. These individual shares were added to reach Drebick's total proposed impact fee.

44. The independent fee calculation takes varying trip lengths into account through its projection of the number of Drebick trips which would reach each project group.

45. The City staff objects to this calculation for a number of reasons. First, they state that the number of afternoon peak hour trips generated by the Drebick proposal should be 98, not 81. For the reasons set out in Part IV of the Findings, below, the City staff is correct in that assertion.

46. The staff objects that this calculation improperly distributes the cost of capacity improvements over all traffic using the improvement after its completion, and not just the new trips which made the capacity improvement necessary. This issue is addressed in detail in Part V of the Findings and Part IV of the Conclusions, below.

47. The staff also points out that the rounding in which the independent calculation engages may disguise some impact. However, Mr. Stamm of the City testified that he did not believe that any of the projections of Drebick trips on specific links in the independent fee calculation were lower than they should be due to rounding.

48. The City staff also testified that the independent fee calculation understated the number of trips, both from the Drebick project and in total, that would affect capacity projects

which involve road widening. Mr. Smith of the City staff testified that traffic crossing a roadway also affects the potential need for widening that roadway and thus should be counted in assessing the effect of traffic from a specific project. The independent fee calculation did not do this.

49. The staff disagreed with the projection of total 1998 traffic in the independent fee calculation found in Column C of Ex. 1, Att. H. Mr. Smith testified that the projection of 1998 traffic should be based on transportation facilities actually in place. The projection of 1998 traffic in the independent fee calculation assumed the improvements committed to be built within the following six years were also in place in 1998.

50. Finally, the staff testified that the independent fee calculation should use the total project cost of the various improvements from the 1999 impact fee update ordinance, instead of the older cost numbers which it used. This change would increase the total cost of all the improvements from $31,233,102 to $32,487,100, as shown in Columns G and G1 in Ex. 10, Tab 5.

IV. Calculation of the number of trips generated by this proposal.

51. The Institute of Transportation Engineers publishes a manual for use in projecting the number of vehicle trips which will be generated by different types and sizes of land uses. This manual is regularly used by cities and counties throughout the country for this purpose. The ITE manual has been published in different editions. The 5th Edition, Ex. 6, was published in 1991. The 6th Edition, Ex. 7, was published in 1997.

52. The City uses the ITE Trip Generation Manual to calculate the number of trips generated by a various land uses in the calculation of impact fees.

53. For purposes of this decision, a trip is a single direction vehicle movement with either the origin or destination at the development in question.

54. The 5th Edition of the ITE Manual was the basis for the trip generation rates found in the Transportation Impact Fee Rate Study prepared for the City by JHK Associates dated March 29, 1995. As described in Finding 12, this Study was incorporated into Ordinance No. 5508, effective April 17, 1995, which adopted the impact fee provisions of OMC Title 15. The City subsequently adopted a new impact fee schedule based on the trip generation projections of the 6th Edition. This newer impact fee schedule was adopted after Mr. Drebick filed an application both for land use approval and for a building permit for the project under consideration.

55. The transportation impact fees imposed on the Drebick project by the City are based on the 5th Edition of the ITE Manual.

56. The Traffic Impact Analysis (TIA) for this project was prepared in June 1998 and is found at Ex. 1, Att. B. The TIA was based on the 6th Edition of the ITE Manual. The City accepted the TIA and its use of the 6th Edition for "general transportation impact analysis for SEPA purposes". Ex. 1, p. 9. SEPA is the State Environmental Policy Act, Chap. 43.21C RCW. Mr. Drebick takes the position that the transportation impact fees here at issue should also be based on the 6th Edition.

57. Using the 6th Edition, the TIA projected an afternoon peak hour rate of 1.49 trips per 1000 square feet of general office building. This is an average rate for office buildings of all sizes. At this rate, the Drebick proposal would generate 81 afternoon peak hour trips.

58. Using the 5th Edition, the City staff projected an afternoon peak hour rate of 1.80 trips per 1000 square feet for

this size of office building. At this rate, the Drebick proposal would generate 98 afternoon peak hour trips.

59. The City staff also submitted evidence showing that under the 6th Edition the number of trips generated by a general office building could be calculated in two ways; through the weighted average or the linear regression methods. These methods are explained in detail in the testimony of David Smith of the City staff on June 13, 2000. Mr. Smith testified that using the weighted average method, an office building of the size here proposed would generate 81 afternoon peak hour trips, while under the linear regression method, it would generate 133 such trips. Mr. Smith testified that although the City used the weighted average method to project the number of trips under the 6th Edition for, SEPA purposes, the City would use the linear regression method for impact fee purposes.

60. The Institute of Transportation Engineers also publishes a "Trip Generation Handbook", which is a guide to use of the Trip Generation Manual. Chapter 3 of the Handbook relating to the 6th Edition of the Manual is found at Ex. 10, Tab 12. Beginning at p. 9 of this Handbook is a Series of eight steps to be used to determine how best to estimate trip generation using the Manual. Step 8 lists a number of features of the data collected for a project which indicate that the linear regression method should be used instead of the weighted average. These criteria suggest that the linear regression method should be used for the Drebick project.

61. As held in Part III of the Conclusions below, the City's use of the 5th Edition of the ITE Manual for calculating impact fees for the Drebick proposal was proper. Therefore, it is not necessary to decide between use of the linear regression or weighted average methods of the 6th Edition. The evidence was unquestioned that under the 5th Edition this project would generate 98 afternoon peak hour trips. For purposes of

calculating impact fees under RCW 82.02.050 et seq., the City's use of that figure was proper.

V. <u>The time period over which project costs are distributed</u>.

62. By their nature most traffic improvements cannot be built in segments. No service or capacity is afforded by part of a traffic light or one-half of a lane. The design life of the transportation improvements here at issue is expected to be about 20 years.

63. Because of this, the transportation improvements funded by impact fees will typically provide capacity for more than the six-year period in which they are assessed. That is, they will serve and benefit traffic generated more than six years after the end of the six-year capital facilities period in which they are assessed. They will also serve and benefit traffic in existence on the date their construction is completed.

64. The transportation improvements funded by impact fees do not include projects which were needed to remedy existing deficiencies in the City's transportation system. These are projects on facilities with an existing LOS which was below the City's adopted standard. Instead, the transportation improvements funded by impact fees are those necessary to meet or maintain the adopted LOS due to the growth in traffic which is projected to occur during the applicable six-year period. Thus, the transportation improvements funded by impact fees are made necessary due to the growth in traffic during the six-year period.

65. As summarized in Finding 32, above, the transportation impact fees assessed by Olympia are based on the average cost of a new trip in the UGA over the applicable six-year period. This average is derived by dividing the number of new, afternoon peak-hour trips during the six-year period into the cost of the transportation improvement projects in the

UGA needed to provide capacity for new growth over the same six-year period. Thus, this method distributes the cost of these improvements over the new trips generated during the six-year period. It does not distribute the cost over all the trips which are projected to use the improvements at the end of the period or over the capacity of the improvement at the end of the period. Nor does it distribute the costs over the trips which are projected to use the improvements during or at the end of their useful life. If either of these alternative methods were used, the average cost of a new trip and the resulting impact fee rate would be significantly lower.

66. The effect of the method used by Olympia is that developments approved during a particular six-year period will be assessed impact fees to fund projects which will provide capacity for growth which will occur beyond that six-year period. However, because the transportation impact fees assessed through this method pay for about one-half of the facilities needed to accommodate new growth, see Finding 31, this does not necessarily mean that developments approved during a particular six-year period will in fact finance capacity for growth which occurs beyond that period.

67. Under Olympia's method, a proponent who is assessed impact fees to provide capacity for growth which will occur beyond that six-year period may also benefit from excess capacity funded by development approved before his. The Drebick proposal benefits to an undetermined degree from such excess capacity funded in part by previous developments. The Drebick proposal will also benefit to an undetermined degree from excess capacity funded by those paying impact fees in subsequent six-year periods.

68. The independent fee calculation proposed by Mr. Drebick divided the projected number of Drebick trips on each project group link by the total traffic on that link at the end of the six-year period. See Ex. 4, Tab 5 and Ex. 10, Tab 9. The

resulting percentage was then applied to the total project cost of that link to derive the proposed impact fee for the Drebick proposal for that link. See Ex. 4, Tab 5. The proposed fees for each link were added to obtain the total proposed transportation impact fee for the Drebick development.

69. The effect of the method proposed by Mr. Drebick is to distribute the cost of providing the capacity improvements made necessary due to the growth in traffic during a six-year period over all traffic using the improvement at the end of the six-year period.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW[3]

I. The standard of review.

The impact fees at issue in this appeal were imposed under the authority of RCW 82.02.050 et seq. As noted, each local ordinance imposing these fees

> "(4) Shall allow the county, city, or town imposing the impact fees to adjust the standard impact fee at the time the fee is imposed to consider unusual circumstances in unusual cases to insure that impact fees are imposed fairly; [and]
>
> (5) Shall include a provision for calculating the amount of the fee to be imposed on a particular development that permits consideration of studies and data submitted by the developer to adjust the amount of the fee . . ."

RCW 82.02.060 (4) and (5).

The City of Olympia has implemented these requirements through the adoption of OMC 15.10.020, which allows an

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[3] Due to the complexity of some of the legal issues raised, the conclusions of law are expressed in opinion form, rather than as numbered conclusions.

individual assessed an impact fee to submit an independent fee calculation to the Director of the Community Planning and Development Department. The fees imposed by the impact fee schedule are presumed valid. The Director, however, in response to an independent fee calculation,

> "is authorized to adjust the impact fees on a case-by-case basis based on the independent fee calculation, the specific characteristics of the development, and/or principles of fairness."

OMC 15.10.020 D.

The Director's decision on the independent fee calculation may be appealed to the Hearing Examiner. The Hearing Examiner may

> "so long as such action is in conformance with the provisions of this title, reverse or affirm, in whole or in part, or may modify the determinations of the Director with respect to the amount of the impact fees imposed or the credit awarded upon a determination that it is proper to do so based on principles of fairness and may make such order, requirements, decision or determination as ought to be made, and to that end shall have the powers which have granted to the Director by this title."

OMC 15.06.080 H.

This appeal to the Hearing Examiner is governed by standards of review which could conflict with each other. On one hand, the appeal is conducted as an open-record hearing in which the Examiner may admit and consider evidence which was not before the Director in making the decision on appeal. The Examiner is expressly authorized to make findings of fact on "the applicability of the impact fees to a given development activity, the availability or amount of the credit, or the

accuracy or applicability of an independent fee calculation." OMC 15.06.080 G.

On the other hand, this appeal is subject to OMC 18.75.040 F, which states that

> "the Examiner shall accord due deference to the expertise and experience of the staff rendering such decision. The Examiner shall only grant the relief requested by an Appellant upon finding that the Appellant has established that:
>
> 1. the staff engaged in unlawful procedures or failed to follow a prescribed procedure;
>
> 2. the staff's decision was an erroneous interpretation of the law;
>
> 3. the decision is not supported by substantial evidence within the context of the whole record;
>
> 4. the decision is a clearly erroneous application of the law to the facts;
>
> 5. the decision is outside the authority or jurisdiction of the decision-maker;
>
> 6. the decision violates the constitutional rights of the party seeking relief; or
>
> 7. the decision is clearly in conflict with the City's adopted plans, policies or ordinances."

These standards are almost identical to those contained in the Land Use Petition Act (LUPA), Chap. 36.70C RCW, for the record review of certain local decisions. In fact, the substantial evidence standard adopted for the review of factual matters is identical to the standard applied by Superior Court, in reviewing administrative decisions under LUPA or a writ of certiorari and by appellate courts in reviewing the factual findings of Superior Court. The potential difficulty in applying

these standards lies in the requirement to make findings of fact on the basis of all the evidence, while determining whether the factual aspects of the Director's decision are supported by substantial evidence in the record.

In interpreting a statute or ordinance, all provisions should be harmonized and given effect. See State v. Thorne, 129 Wn.2d 736, 921 P.2d 514 (1996). The standards of review noted above may be harmonized in. the following manner. Evidence not submitted to the Director may be admitted at the appeal hearing as long as it meets the standards of admissibility customarily applied in hearing examiner hearings; that is, it must be the sort of evidence a reasonable person would deem probative of the matter and it cannot be privileged. The evidence before the Examiner at the appeal hearing consists of all exhibits admitted and all testimony to which an objection was not sustained. The City has the responsibility of insuring that the evidence on which the Director relied in making his decision is included in the record before the Examiner.

All factual findings and determinations embodied in the Director's decision are judged under the substantial evidence standard. That is, the Examiner must uphold them if there is substantial evidence in the record to support them. Substantial evidence is evidence which would convince an unprejudiced thinking mind of the truth of the declared premise. Bjarnson v. Kitsap County, 78 Wn. App. 840, 844-45, 899 P.2d 1290 (1995). In applying this standard to the factual determinations of the Director, the Examiner may consider all evidence admitted at the hearing. In making any factual determinations other than those embodied in the Director's decision, the Examiner may make those findings which he believes are best supported by the evidence as a whole.

In this manner the substantial evidence standard is applied to the Director's factual determinations, while the ability of the Examiner to make factual findings in the customary manner on

other matters is preserved. Any legal conclusions by the Examiner are governed directly by OMC 1[illegible]5.040 F. The ultimate decision on the appeal depends on whether any of the standards listed in OMC 18.75.040 F have been satisfied. The burden is on the Appellant to show that at least one of those standards has been met. In all matters of fact, the burden of proof is on the Appellant. The Examiner may decide issues of law de novo, but must accord due deference to the expertise and experience of the staff in making any legal determinations. See OMC 18.75.040 F.

A separate question concerns the nature of the substantive standards which a Hearing Examiner should apply in determining whether the Director's rejection of an independent fee calculation was correct. RCW 82.02.060 (4), cited above, is clear that an independent fee calculation is designed to consider "unusual circumstances in unusual cases to insure that impact fees are. imposed fairly". OMC 15.10.020 D., however, allows the Director to adjust a fee on the basis of "the specific characteristics of the development, and/or principles of fairness." The City, thus, has chosen to implement RCW 82.02.060 (4) by imposing two distinct standards on the Director's decision. The fee may be adjusted on the basis of specific unusual characteristics of the development, or on principles of fairness.

Finding 41 upholds the Director's finding that there are no specific characteristics of the Drebick development which would warrant an adjustment in the impact fees imposed by Olympia's ordinance. Thus, this appeal will turn on the Director's implicit determination that the fees imposed by the City on the Drebick proposal are consistent with principles of fairness.

The notion of fairness has been both a compelling and vexing focus of dispute since Socrates walked in the Athenian sun. Fortunately, the statute authorizing impact fees signals

clearly what the legislature saw as principles of fairness in their application. According to RCW 82.02.050 (3), impact fees

> "(a) Shall only be imposed for system improvements that are reasonably related to the new development:
>
> (b) Shall not exceed a proportionate share of the costs of system improvements that are reasonably related to the new development; and
>
> (c) Shall be used for system improvements that will reasonably benefit the new development."

"Proportionate share" in turn, is defined as "that portion of the cost of public facility improvements that are reasonably related to the service demands and needs of new development." RCW 82.02.090 (5).

These are the standards which should be applied in determining whether the fees imposed by the City on the Drebick proposal are consistent with principles of fairness. Because they involve the application of law to fact, the clearly erroneous standard from OMC 18.75.040 F.4 governs the Examiner's review of the Director's application of these standards. If the fees imposed by the City meet these standards, the inquiry is over. The Examiner does not have authority to reject a fee which meets these statutory standards of fairness, simply because another method of calculation might more closely relate fees imposed on a development to each individual project funded by the fees.

A decision that the fees imposed on the Drebick proposal do not meet the standards of relationship, proportionality and benefit found in RCW 82.02.050 (3) could effectively call the entire Olympia impact fee ordinance into question on those grounds. A Hearing Examiner lacks the authority to invalidate an ordinance. The Hearing Examiner, though, is under a duty in this situation to decide Mr. Drebick's appeal of the Director's

denial of his independent fee calculation. As just discussed, the decision of that appeal demands the inquiry into whether the standards of RCW 82.02.050 (3) are met by the impact fees imposed on the Drebick proposal. I am under a duty to make that determination. If my decision should go against the Director's position, he is free to appeal that decision to Superior Court, which is the proper forum for determining the facial invalidity of any ordinance.

II. The issues of reasonable relationship, proportionality and benefit.

A. The issues as presented by the Findings of Fact.

As shown in Part II of the Findings, the Drebick impact fee is ultimately based on the cost of a series of transportation capacity improvements which are made necessary by the new growth of which the Drebick development is a part. As shown in the Findings, the Drebick fee takes into account the number of trips generated by the proposal, the length of those trips, and the amount of "pass-by" traffic which a use of that type is expected to have. Thus, the Drebick fee is proportionate to and reasonably related to the demand for new capacity improvements considered as a whole. As also found, those improvements considered as a whole will benefit the Drebick development. The tailoring of the Drebick fee to the number of trips generated, the length of those trips, and the "pass-by" traffic insures that the fee bears a reasonable relationship to the benefit the Drebick development obtains from these traffic improvements. considered as a whole.

Part II of the Findings also shows that there is no relationship or proportionality between the individual capacity project groups on which the Drebick fee is based and the needs or service demands created by the Drebick proposal. Mr. Drebick is asked to pay a fee which is in part based on the need for capacity projects to which the Drebick proposal will contribute little or no traffic. Stated another way, the Drebick

fee is based on the need for some capacity projects which are not needed to serve Drebick traffic.

On the question of benefit, it is possible that a specific improvement to which Drebick will contribute little or no traffic will nonetheless benefit the Drebick development by relieving traffic pressure on a facility which Drebick traffic will use or by improving emergency access to the Drebick site. However, no evidence was submitted showing this for any specific transportation improvement. Thus, the only way in which the Drebick proposal is benefitted by the improvements it is asked to help fund is in the general benefit it and any other development gains from a better road and street system.

On the basis of the facts presented, one major legal issue is whether the relationship and proportionality between a transportation impact fee and the service demands created by a proposal assessed the fee is judged by examining the demands of the proposal on each transportation project group funded by that fee or by viewing the demands of the proposal and the improvements funded by the fee a as (sic) whole.

The second issue is whether a proposal assessed a transportation impact fee must be reasonably benefitted by each transportation project group funded by that fee or by all such project groups considered together.

The heart of each issue is whether the projects funded by a transportation impact fee are viewed separately or together in judging whether the requisite relationship is present. These issues may be answered by recourse to the statutes and the case law.

B. RCW 82.02.050 et seq.

As noted, Olympia's transportation impact fees are imposed under the authority of RCW 82.02.050 et seq. Impact fees are defined by RCW 82.02.090 (3) as

> "a payment of money imposed upon development as a condition of development approval to pay for public facilities needed to serve new growth and development, and that is reasonably related to the new development that creates additional demand and need for public facilities, that is a proportionate share of the cost of the public facilities, and that is used for facilities that reasonably benefit the new development. . ."

These requirements are reflected in RCW 82.02.050, the section which authorizes the imposition of impact fees. According to subsection (3) of that section, impact fees:

> (a) Shall only be imposed for system improvements that are reasonably related to the new development;
>
> (b) Shall not exceed a proportionate share of the costs of system improvements that are reasonably related to the new development; and
>
> (c) Shall be used for system improvements that will reasonably benefit the new development.

These are the statutory standards which govern this appeal.

1. <u>The requirements of a reasonable relationship and proportionality</u>.

"Proportionate share" is defined by RCW 82.02.090 (5) as

> "that portion of the cost of public facility improvements that are reasonably related to the service demands and needs of new development."

At the hearing, I invited counsel to address the significance, if any, of the varying use of the terms "the new

development" and "new development" in these and other provisions in the authorizing statutes. On reflection, this distinction is not of great help in resolving these issues. First, the definition of "development activity" in RCW 82.02.090 (1) focuses on specific developments, not new development in general. More to the point, the statute as a whole requires some degree of proportionality between the impact fee imposed on a development and the need for new facilities created by that development. Olympia argues that the required proportionality is between the development type, through the number and length of trips it will generate, and the cost of all the improvements needed to serve new growth in the appropriate six-year period. Drebick argues that the required proportionality is between the development type and each transportation project group on which the fees are based. Each are agreed that the effect of the specific development or development type must be examined. They differ in whether the improvement projects funded must be viewed separately or as a whole in determining proportionality.

Turning first to the text of the statute, the heart of its demands is found in RCW 82.02.050 (3) (a) and (b), which, as noted above, require that impact fees

> "[s]hall only be imposed for system improvements that are reasonably related to the new development [and] [s]hall not exceed a proportionate share of the costs of system improvements that are reasonably related to the new development . . ."

The phrase "reasonably related" is not defined. However, the definition of "proportionate share" from RCW 82.02.090 (5), supra, makes clear that the requisite relationship is between the service demands of the Drebick development and the share of the cost of improvements imposed on Drebick through the impact fee.

The Drebick development will contribute a negligible amount of traffic to some of the improvements on which its fee is based. Thus, there is no reasonable relationship between the service demands of the Drebick development and the costs of some of the system improvements it is required to fund. When a new development lacks a reasonable relationship with some of the system improvements on which its impact fee is based, it is difficult to say that the fee is imposed only for system improvements that are reasonably related to the new development. That, however, is the requirement of RCW 82.02.050 (3) (a). The statutory text indicates that the Drebick fee does not meet the requirements of a reasonable relationship imposed by that section.

Even if this requirement were met, the fee would still be subject to the demand of proportionality from RCW 82.02.050 (3) (b). Olympia argues that this demand is met by basing its fees on the cost of capacity improvements needed to serve all new development and its reliance on the number and length of trips of specific land use types to insure that specific impact fees are proportionate to that cost.

Even if impact fees are deemed taxes, as opposed to regulatory fees, they cannot be arbitrary and capricious and must rest on some rational basis. Oil Heat Institute v. Mukilteo, 81 Wn.2d 7, 11, 498 P.2d 864 (1972). If a tax designed to address the traffic impact of a development were imposed without regard to the traffic impact of that development, it seems likely that it would founder on these general principles. These principles require at least that the impact of a type of development be considered in assessing impact fees. In the area of traffic, this impact inevitably is measured by the number and length of trips generated. Thus, if the proportionality standard of RCW 82.02.050 (3) (b) means only that the City must take the number and length of Drebick trips into account in assessing its impact fee, it would only mirror the otherwise applicable requirements of due process. Likewise, if the requirement of

proportionality means that the City must restrict impact fees to funding those projects made necessary by new development as a whole, it would simply repeat the requirement of RCW 82.02.060 (7) "that impact fees cannot be used to make up for existing system deficiencies.

Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous. City of Seattle v. State, 136 Wn.2d 693, 698, 965 P.2d 619 (1998). If the requirement of proportionality is met by the fees imposed on the Drebick development, that requirement would be superfluous, given the underlying requirements from Oil Heat. Thus, proportionality requires something more than multiplying the number of new trips from a development, adjusted for length and "pass-by" traffic" by the jurisdiction-wide cost of a new trip. That, however, is the method used by Olympia.

An element of the authorizing statutes which supports Olympia's approach is the requirement of RCW 82.02.060 (1) that impact fees be imposed through a schedule of fees for each type of development activity. If fees must be imposed through the method used by Mr. Drebick's consultants, a projection of the number of trips from each development to each system improvement funded, it is difficult to see what role is left for a fee schedule.

On the other hand, the requirement of a schedule does not demand that a development's effect on the individual improvements be ignored. With the detailed information from the City's traffic model giving the number and distribution of trips among the TAZ's, it should be possible to devise a fee schedule using that information which achieves some proportionality between a development and its effect on the various improvements funded. The requirement of proportionality does not mandate that the number of trips be individually calculated between each development charged

impact fees and each system improvement funded by those fees. It does require, though, that a development not be charged impact fees to fund projects on which it has no impact and from which it receives no benefit.

2. The requirement of a reasonable benefit.

RCW 82.02.050 (3) (c) requires that impact fees "[s]hall be used for system improvements that will reasonably benefit the new development." As already found, not all of the individual system improvements on which the Drebick fee is based will benefit the Drebick development. That development, however, will benefit from the general improvement in traffic conditions from these system improvements. The impact fees which Drebick has been assessed will help fund this general improvement from which the Drebick development will benefit. The Olympia staff argues that this general type of benefit satisfies RCW 82.02.050 (3) (c).

The Findings show the Drebick proposal would be benefitted by some, but not all of the improvements its fees would fund. As with the requirement of a reasonable relation discussed above, it is difficult to conclude that the Drebick fees are "used for system improvements that will reasonably benefit the new development", as required by RCW 82.02.050 (3) (c), when some of the improvements which they will fund have no benefit to the Drebick development. Thus, the statutory text itself indicates that the Drebick fee does not meet the requirements of RCW 82.02.050 (3) (c).

A canon of statutory construction leads to the same conclusion. "System improvements" are defined by RCW 82.02.090 (9) as

> "public facilities that are included in the capital facilities plan and are designed to provide service to service areas within the community at large, in contrast to project improvements."

This restricts system improvements to those within the City or its unincorporated UGA. If, the staff argues, system improvements within this area benefit all developments in the City, then the requirement of RCW 82.02.050 (3) (c) is redundant, since system improvements must be located in this area by virtue of their definition in RCW82.02.090 (9). Because of its redundancy, this reading of RCW 82.02.050 (3) (c) should not be followed. See City of Seattle v. State, 136 Wn.2d at 698.

This redundancy may be avoided by reading RCW 82.02.050 (3) (c) to require some showing that the specific developments" funded by impact fees benefit the development paying the fees. As with the requirements of relationship and proportionality discussed above, this does not mandate a separate calculation of the number of trips between each development charged impact fees and each system improvement funded by those fees. It does require, though, that a development not be charged impact fees for projects which will not benefit it.

C. Other statues.

1. RCW 82.02.020.

RCW 82.02.050 et seq. was not the first statute authorizing impact fees in Washington. One of the more important fee statutes in effect at the adoption of RCW 82.02.050 et seq. was RCW 82.02.020. This statute provides in pertinent part that

> "Except as provided in RCW 82.02.050 through 82.02.090, no county, city, town, or other municipal corporation shall impose any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of residential buildings, commercial buildings, industrial buildings, or on any other building or building space or appurtenance thereto,

> or on the development, subdivision, classification, or reclassification of land. However, this section does not preclude dedications of land or easements within the proposed development or plat which the county, city, town, or other municipal corporation can demonstrate are reasonably necessary as a direct result of the proposed development or plat to which the dedication of land or easement is to apply.
>
> This section does not prohibit voluntary agreements with counties, cities, towns, or other municipal corporations that allow a payment in lieu of a dedication of land or to mitigate a direct impact that has been identified as a consequence of a proposed development, subdivision, or plat. . ."

Under this section, a city could impose an impact fee to mitigate a direct impact of a proposal such as Mr. Drebick's through a voluntary agreement. The meaning of "direct impact" was well illustrated in Castle Homes v. Brier, 76 Wn. App. 95, 882 P.2d 1172 (1994). The City imposed fees on developments to fund street improvements by taking the full cost of those improvements needed in a certain quadrant of the City to accommodate new development and dividing that by the number of lots in all the new or pending subdivisions in that quadrant. The result was the fee for each lot. Id. at 97-98. Even though proportionate, the Court struck this down because it did "not take into account the direct impact of each subdivision location and the differing street distribution impacts of each." Id. at 97-98. This result strongly suggests that RCW 82.02.020 requires the sort of individual analysis used by Mr. Drebick, instead of the jurisdiction-wide approach used by Olympia. Accord, Cobb v. Snohomish County, 64 Wn. App. 451, 829 P.2d 169 (1991).

The case law is less clear on the meaning of "voluntary agreement". The Court of Appeals has stated that "voluntary",

in this context, means that the developer has a choice of either paying for reasonably necessary costs which are directly attributable to the project or losing approval. Cobb, 64 Wn. App. at 457-58. However, the state Supreme Court in Henderson Homes v. Bothell, 124 Wn.2d 240, 246, 877 P.2d 176 (1994), indicated that presenting the developer with that sort of "take it or leave it" proposition did not create a voluntary agreement. The Court suggested that there must be some sort of negotiation between the government and the developer over the fee amount or how the fees were to be spent. Id. The opinion in Trimen Development v. King County, 124 Wn.2d 261, 877 P.2d 187 (1994), held an agreement voluntary because the developer had a choice of dedicating land or paying a fee in lieu of dedication. Trimen, 124 Wn.2d at 272. This situation, however, still presented the developer with the choice of paying a fee or losing approval, which the same court in Henderson Homes frowned on.

As noted, a statute should be construed to give its provisions effect and to avoid redundancy. City of Seattle, 136 Wn.2d at 698. Under Mr. Drebick's reading, RCW 82.02.050 et seq. would use the same direct impact standard as RCW 82.02.020. However, both the City's and Mr. Drebick's reading of RCW 82.02.050 et seq. would eliminate the requirement of a voluntary agreement to impose impact fees. Thus, each reading represents a change from the requirements of RCW 82.02.020. Neither reading renders the statute superfluous.

2. SEPA.

Under the State Environmental Policy Act (SEPA), Chap. 43.21C RCW, a governmental entity may subject land use approvals to conditions which 1) are based on formally designated, SEPA polices, 2) mitigate specific environmental impacts of the project which are identified in the documents prepared under SEPA, and 3) are in writing and are reasonable

and capable of being accomplished. RCW 43.21C.060. Environmental impacts are defined as the effects of actions on the elements of the environment. WAC 197-11-752. The elements of the environment include transportation systems, vehicular traffic, and the movement or circulation of people or goods. WAC 197-11-444(2)(c). A SEPA condition may require the payment of money to mitigate an adverse environmental impact. See Prisk v. Poulsbo, 46 Wn. App. 793, 800, 732 P.2d 1013 (1987) and RCW 43.21C.065. Thus, transportation impact fees may be imposed under SEPA.

Mr. Drebick's reading of RCW 82.02.050 et seq. arguably makes it redundant of SEPA, since both require a showing of a direct impact by the development charged on each improvement funded. However, the reading of RCW 82.02.050 et seq. promoted by both the City and Mr. Drebick would dispense with the procedural requirements of SEPA and the requirement of formally designated SEPA polices to impose impact fees. Thus, neither reading makes RCW 82.02.050 et seq. redundant of SEPA.

3. The Local Transportation Act.

In 1988 the legislature adopted the Local Transportation Act (LTA), Chap. 39.92 RCW, which authorized local governments to impose transportation impact fees on new development. The statute defines transportation impact fee as

> "a monetary charge imposed on new development for the purpose of mitigating off-site transportation impacts that are a direct result of the proposed development."

RCW 39.92.020 (6).

> "Direct result of the proposed development", in turn, is defined as

> "those quantifiable transportation impacts that are caused by vehicles or pedestrians whose trip origin or destination is the proposed development."

RCW 39.92.020 (3).

This scrutiny of individual impact is virtually indistinguishable from that proposed in the independent fee calculation by Mr. Drebick. Thus, if the requirement of a direct, individualized impact is viewed in isolation, the interpretation of RCW 82.02.050 et seq. proposed in the independent fee calculation is redundant of the LTA and should not be followed under City of Seattle, supra.

On the other hand, RCW 82.02.050 et seq. authorized several different types of impact fees, including those for transportation, while the LTA authorized only those for transportation improvements. If the legislature desired to adopt the direct impact standard of the LTA for all the impact fees authorized by RCW 82.02.050 et seq., it would have been most rational to gather all the fee types in that single statute, instead of authorizirtg fees for parks, schools and fire protection in the new statute and leaving transportation impact fees in the existing LTA. Thus, the adoption of a single new statute imposing the direct impact standard on all impact fees would not be superfluous.

Perhaps more to the point, the legislature expressly stated in the LTA that its fees are not taxes. RCW 39.92.010. Impact fees under RCW 82.02.050 et seq., however, have been held to be taxes, New Castle Investments v. City of LaCenter, 98

Wn.App. 224, 234 (1999).[4] The Olympia staff characterizes these fees as taxes, not regulatory fees. Thus, even if the LTA and RCW 82.02.050 et seq. were to require the same level of impact, the latter statute still effected a change in the law by classifying the charges as taxes.

None of the interpretations of RCW 82.02.050 et seq. put forth by the parties would make the statute's treatment of transportation impact fees redundant. Thus, the canon condemning interpretations which make statutes superfluous does not require the rejection of either side's interpretations.

D. The case law.

No reported appellate court decisions of this State have decided the issues of relationship, proportionality and benefit posed in this appeal. Two decisions of the Court of Appeals, though, each point to opposite resolutions. A decision of Superior Court for Thurston County squarely supports Olympia's view.

In Castle Homes v. Brier, 76 Wn. App. at 95, the City had imposed transportation impact fees under the same general methodology used here by Olympia. The City calculated the full cost of street improvements needed in a certain quadrant of the City to accommodate new development and divided that cost by the number of lots in all the new or pending subdivisions in that quadrant. New developments then were charged that fee for each lot. Id. at 97-98. This is conceptually indistinguishable from Olympia's method, which calculated of the cost of capacity improvements needed to accommodate new development throughout the City, divided that cost by the total

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[4] The New Castle opinion at one point states that the impact fee ordinance imposes a tax, id. at 234, and at another point that it does not hold that the fees are taxes. Id. 236. The plain import of the opinion, though, is to characterize impact fees under RCW 82.02.050 et seq. as taxes.

number of new trips for the average cost of a new trip, and charged new developments that cost times the number of new trips they generate adjusted for length.

The Court contrasted this Olympia-like method, which it called "proportionate share", with another method denominated "fair share". The latter method "describes the cost to a developer for the traffic impacts directly related to the individual project." Id. at 98, n. 2. The Court then stated that the definition of proportionate share in RCW 82.02.090 (5) "is more closely aligned with 'fair share' as used by the parties, as it requires costs of the improvements as being 'reasonably related' to the new development." Id. at 98, n. 4. Castle Homes dealt with RCW 82.02.020, not RCW 82.02.050 et seq. Therefore, its statements about the latter statute are dictum. Nonetheless, those statements disclose the Court's view that Brier's (and Olympia's) method does not comply with RCW 82.02.050 et seq.

Division II of the Court of Appeals proceeds in the opposite direction. The issue posed in New Castle, supra, was whether transportation impact fees imposed under RCW 82.02.050 et seq. were subject to the vesting statute for subdivisions, RCW 58.17.033. To answer that, the Court asked whether impact fees were "land use control ordinances", as that term is used in RCW 58.17.033. One of its reasons for answering that question in the negative was its conclusion that these impact fees were more in the nature of a tax than a regulatory fee. In reaching that conclusion, the Court examined the three distinctions between taxes and regulatory fees set out in Covell v. City of Seattle, 127 Wn.2d 874, 879, 905 P.2d 324 (1995). The last of these distinctions asks "whether there is a direct relationship between the fee charged and the service received by those who pay the fee or between the fee charged and the burden produced by the fee payer." Covell, 127 Wn.2d at 879.

The Court held that impact fees resemble taxes under this criterion, because

> "there is no direct relationship between the fees charged and the particular development. Although impact fees must be 'reasonably related' to the impact of new development on the public infrastructure, they are not individually calculated for each new development, but rather are based on a general calculation that applies to all new development. . . By the clear language of the statute, GMA impact fees are not intended to compensate local governments for the direct impacts of specific development projects on specific components of local infrastructure systems or to finance programs that regulate development."

New Castle, 98 Wn.App. at 234 and 236.

The clear import of this holding is to uphold the method followed by Olympia in assessing impact fees. The effect of the dictum in Castle Homes would be to invalidate Olympia's method. Thus, the appellate court decisions are split on the central issue presented by this appeal.

In 1999 Olympia's impact fee ordinance was upheld against a challenge in Washington Manufactured Housing Association v. City of Olympia, Thurston County Superior Court No. 96-2-03927-3. In its decision, the Court entered the following Conclusions of Law:

> "2. Olympia's impact fee ordinance complies with RCW 82.02.050 (3) (a) because the City's Impact Fees are used only for System Improvements that are 'reasonably related' to new development. The City is not required to show a direct relationship between construction of Plaintif's new office building and the impact fee.

3. The City's impact fees do not exceed a proportionate share of the costs of system improvements that are reasonably related to new growth and complies with RCW 82.02.050 (3) (b).

4. The City's impact fees are used to fund only the cost of system improvements which reasonably benefit new development in compliance with RCW 82.02.050 (3) (c)."

This decision, however, does not indicate whether the issues presented here of individualized versus area-wide proportionality were argued to the Court. Further, the only transportation improvement discussed in the Findings is the intersection of Cooper Point Road and Evergreen Park Drive. According to the Superior Court decision, at Finding 7, this intersection actually fronts on the development assessed the impact fees at issue. Thus, the development has a direct effect on that improvement, meeting virtually any interpretation of the requirements of relationship and proportionality. These considerations, combined with the split of authority in the appellate courts, suggest that the decision in Manufactured Housing should not be deemed to conclude the issues presented in this appeal.[5]

E. The distinction between taxes and regulatory fees.

As stated above, Division II of the Court of Appeals views impact fees imposed under RCW 82.02.050 et seq. as taxes. New Castle, 98 Wn.App. at 234. This conclusion seems at odds with the decision of Division I in View Ridge Park v. Montlake Terrace, 67 Wn. App. 588, 839 P.2d 343 (1992). In View Ridge Park, the Court held to be a regulatory fee an ordinance

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[5] The decision of the Thurston County Superior Court in Olympia Master Builders v. City of Olympia, No. 92-2-02215-7 (4-28-93) does not reach the issues of relationship, proportionality and benefit presented in this appeal. It does hold impact fees to be taxes.

which required applicants for multiple unit residential developments to construct on-site recreational facilities varying in value according to the number of units or to pay a fee in lieu to develop off-site recreational facilities. This fee, although imposed under RCW 82.02.020, shares its essential regulatory feature with Olympia's impact fees. It imposes a financial burden on a development to mitigate the impacts of that development and varies the amount of the fee with the extent of the impact.

New Castle also seems inconsistent with the analysis followed in Teter v. Clark County, 104 Wn.2d 227, 704 P.2d 1171 (1985) and San Telmo Associates v. Seattle, 108 Wn.2d 20, 735 P.2d 673 (1987). The former case held to be regulatory a stormwater utility fee which, as with Olympia's impact fees, varied with the amount of impact and was used to address that impact. The latter case held that an important badge of taxation is the use of revenues to address a general societal problem, as opposed to a problem directly caused by the activity charged. San Telmo, 108 Wn.2d at 25. The analysis in each of these cases would show impact fees under RCW 82.02.050 et seq. to be regulatory.

In spite of these inconsistencies, the holding in New Castle, a published opinion of the Court of Appeals, must be followed. These impact fees must be deemed taxes. Taxes are not required to have anything to do with the activity taxed. A tax on cigarettes, for example, has been used to fund efforts to improve water quality. The effect of classifying impact fees as taxes is largely one of statutory interpretation: as taxes, a much broader range of relationship and proportionality would be allowed to stand. These impact fees, however, must still meet the relationship, proportionality and benefit requirements of RCW 82.02.050 et seq. For the reasons set out above, they do not. Therefore, even if Olympia's impact fees are deemed taxes, their imposition on the Drebick proposal does not meet the principles of fairness embodied in that statute.

F. Nollan and Dolan.

Mr. Drebick argues that the nexus and rough proportionality requirements of Nollan v. California Coastal Commission and Dolan v. City of Tigard, both supra, apply to impact fees. This decision holds that the impact fees imposed on the Drebick proposal do not meet the relationship and proportionality standards of RCW 82.02.050 et seq. Therefore, it is not necessary to decide whether Nollan and Dolan apply to impact fees.

G. Summary of conclusions pertaining to reasonable relationship, proportionality and benefit.

Under Olympia's method, a transportation impact fee assessed a specific development may be based on the cost of projects to which that development will contribute no traffic and which will not directly benefit that development. Specifically, the Drebick development is charged a fee which is in part based on the need for capacity projects to which the Drebick proposal will contribute little or no traffic; that is, the Drebick fee is based on the need for some capacity projects which are not needed to serve Drebick traffic. This does not meet the requirements of RCW 82.02.050 (3) and 82.02.090 (5) that an impact fee not exceed the portion of the cost of public facility improvements that are reasonably related to the service demands and needs of new development.

In addition, on the evidence presented the transportation impact fees assessed the Drebick proposal may be used for system improvements which do not reasonably benefit that development. This does not meet the requirement of RCW 82.02.050 (3) (c).

The conclusion that the Drebick impact fees do not meet the requirements of RCW 82.02.050 (3) does not mean that the City must project the number of trips between every development assessed an impact fee and every system

improvement funded by those fees. As described in the Findings, the City has developed a computer traffic model which projects trips among the hundreds of TAZ's into which the City is divided. As a "gravity" model, the program adjusts the number and distribution of its trip projections as some links and intersections become less passable with increasing use and some become more passable with facility improvements. The model also allows some projection of trip patterns within a TAZ.

The use of this apparently readily accessible information would allow the City to consider proportionality and benefit at the TAZ level. It would have allowed the City to remove those system improvements having an insignificant relation to the Drebick proposal from the calculation of the Drebick fee. It would allow the cost of other improvements to be included in the calculation of the Drebick fee roughly in proportion to the amount of traffic contributed to them. If used with the Drebick fee, this would have removed all grounds for finding any inconsistency with RCW 82.02.050 (3). Any greater or more precise level of traffic analysis is not required in the assessment of impact fees.

III. Trip generation numbers.

According to OMC 15.06.040 D., "[i]mpact fees shall be assessed at the time the complete building permit or occupancy permit application is submitted for each unit in the development, using the impact fee schedule then in effect." As found above, at the time Mr. Drebick submitted his application for a building permit for this project, the 1995 impact fee schedule based on the 5th Edition of the ITE Manual was in effect. Thus, OMC 15.06.040 D. requires that the transportation impact fees for this project be calculated using the 5th Edition of the ITE Manual.

OMC 15.06.040 D. is a type af vested rights rule. It states that a project will be governed by certain standards in effect

when a building permit application is submitted. Division II of the Court of Appeals, however, has held that RCW 58.17.033, the vested rights statute for subdivisions, does not apply to transportation impact fees. New Castle, 98 Wn. App. at 226. The Court's reliance an the common law vested rights doctrine, including the decision in Lincoln Shilo v. Mukilteo Water District, 45 Wn. App. 123, 724 P.2d 177 (1986), rev. den. 107 Wn.2d 1014, suggests that it would also hold that the doctrine does not apply to impact fees assessed for developments which are not subdivisions. See New Castle, 98 Wn. App. at 231-233.

This holding, though, does not prevent local governments fram adopting their own vesting ordinances which are consistent with the purposes af the vested rights doctrine. See Manor v. Pierce County, 133 Wn.2d 269, 279, 943 P.2d 1378 (1997). OMC 15.06.040 D. vests projects under the impact fee standards in effect when a building permit application is submitted. This early vesting rule is consistent with the approach taken by our courts since the doctrine was developed in State ex rel. Ogden v. Bellevue, 45 Wn.2d 492, 275 P.2d 899 (1954) and Hull v. Hunt, 53 Wn.2d 125, 331 P.2d 856 (1958). It plainly affords the developer certainty and the ability to fix the standards applicable to a project: considerations which have underlain the doctrine since those decisions. See e.g. West Main Assocs. v. City of Bellevue, 106 Wn.2d 47, 51, 720 P.2d 782 (1986).

Our courts have also recognized that

> "development interests protected by the vested rights doctrine come at a cost to the public interest because the practical effect of recognizing a vested right is to sanction the creation of a new nonconforming use. If a vested right is too easily granted, the public interest is subverted."

Noble Manor, 133 Wn.2d at 280; citing Erickson v. McClerran, 123 Wn.2d 864, 873-74, 872 P.2d 1990 (1994).

OMC 15.06.040 D. is a vesting rule which been voluntarily adopted by the City and which is well within the general confines of the common law doctrine followed since Ogden, supra. It can hardly be characterized as harming the public interest by too easily granting a vested right.

OMC 15.06.040 D. is within the City's authority and is consistent with the purposes and policies of the vested rights doctrine in general. Under it, the 5th edition of the ITE Manual must be applied to this proposal.

The City staff's use of the ITE 6th Edition to derive trip generation numbers for SEPA purposes seems inconsistent with its use of the ITE 5th Edition for impact fee purposes. Each analysis views the same project under the same conditions. The Drebick building will not somehow generate less traffic when judged under SEPA than when analyzed for purposes of calculating impact fees. Any difference in the analysis used under SEPA and that used under RCW 82.02.050 et seq. has no effect on the number of trips which a project will generate. That is purely a matter of fact which, absent factual reasons to the contrary, should remain constant in each type of analysis.

As concluded above, the City's use of the ITE 5th Edition in calculating trip generation numbers for impact fee purposes was proper. No SEPA issues are presented for decision in this appeal. Any inconsistency in the use of one edition for SEPA purposes and another for impact fee analysis describes no legal flaw in the City's use of the 5th Edition for impact fee purposes.

The City staff also testified that if it were to use the 6th Edition for this project, it would use the weighted average method to calculate the number of trips for SEPA purposes, but the linear regression method for impact fee purposes under RCW 82.02.050 et seq. Because this decision upholds the City's use of the 5th Edition to calculate impact fees for this

project, it is not necessary to decide which of the differing methods would have been proper under the 6th Edition.

As shown in Ex. 10, Tab 6, the 6th edition of the ITE Manual states that "when buildings are interrelated (defined by shared parking facilities or the ability to easily walk between buildings) or house one tenant, it is suggested that the total area or employment of all the buildings be used for calculating the trip generation." Because this decision upholds the City's use of the 5th Edition, it is not necessary to determine whether the proposed building and other nearby buildings owned by Mr. Drebick are interrelated for purposes of this provision.

IV. <u>The time period over which project costs are distributed</u>.

As set out in Part V. of the Findings, above, the transportation improvements funded by impact fees will typically provide capacity for more than the six-year period in which they are assessed. Olympia's method of assessing impact fees distributes the cost of these improvements over the new trips generated during the applicable six-year period. The effect of this method is that developments approved during a particular six-year period will be assessed impact fees to fund projects which will provide capacity for growth which will occur beyond that six-year period. The legal issue presented is whether this violates RCW 82.02.050 et seq.

Absent an "extraordinary and compelling reason", impact fees must be expended or encumbered within six years of receipt. RCW 82.02.070 (3). As stated in Findings 62 and 63, traffic improvements cannot be built in segments and are expected to have a design life of about 20 years. These constraints, however, do not mean that developments assessed impact fees within a particular six-year period must effectively fund capacity for a longer period. A city or county could distribute the costs of an improvement over all new development approved within its design life through devices

such as latecomer agreements. The question is whether RCW 82.02.050 et seq. requires such a distribution of costs.

Mr. Drebick argues that Olympia's method of fixing impact fees lacks the requisite proportionality, because it requires him to fund transportation capacity beyond that which is necessary to serve his project. To repeat the governing standards, impact fees

> "(a) Shall only be imposed for system improvements that are reasonably related to the new development;
>
> (b) Shall not exceed a proportionate share of the costs of system improvements that are reasonably related to the new development; and
>
> (c) Shall be used for system improvements that will reasonably benefit the new development."

RCW 82.02.050 (3). "Proportionate share" is "that portion of the cost of public facility improvements that are reasonably related to the service demands and needs of new development." RCW 82.02.090 (5).

Olympia bases its transportation impact fees on the average cost of a new trip in the UGA over the applicable six-year period. This average is derived by dividing the number of new, afternoon peak-hour trips during the six-year period into the cost of the transportation improvement projects in the UGA needed to provide capacity for new growth over the same six-year period. See Finding 65. In this calculation the cost of the transportation improvement projects is the numerator. The number of new, afternoon peak-hour trips generated during the six-year period is the denominator. The result is the average cost of a new trip in the UGA over the applicable six-year period.

In calculating the Drebick impact fee, the cost figure in the numerator of this equation is derived from those transportation improvement projects in the CFP which were needed during the six-year period from 1994 to 2000 to meet adopted LOS standards. See Findings 15-16. All projects needed to remedy existing deficiencies in the City's transportation system were eliminated from this calculation. Thus, the cost figure in the numerator included only those improvements needed to meet the demands of new growth during the six-year period from 1994 to 2000. The Drebick proposal is part of that new growth.

The denominator represents the new trips during the six-year period from 1994 to 2000 which made the costs shown in the numerator necessary. The trips generated by the Drebick proposal are part of this figure. Dividing the cost of projects made necessary by new growth in a fixed time period by the new growth in that same period which made those projects necessary results in a share of that cost which is reasonably related to the service demands of new development. That falls squarely within the definition of proportionate share found in RCW 82.02.090 (5).[6] Thus, the Olympia method meets the requirements of RCW 82.02.050 (3).

Any perceived disproportionality in requiring Mr. Drebick to fund capacity beyond that needed in his six-year period is tempered by the effects of the entire system. If Mr. Drebick is required to fund some excess capacity, he is also benefitting from the excess capacity funded by those paying impact fees in the past. Further, his project is benefitted by the fact that

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[6] The approach proposed by Mr. Drebick would distribute the cost of improvements needed in each six-year period over all the traffic using the improvement at the end of each period. This would violate the requirement of RCW 82.02.090 (5) that the fee be related to the service demands of new development, not all traffic which happens to be using the improvement at the end of the period.

developments approved in subsequent six-year periods will be similarly charged, thus insuring that the Drebick development will be served by an adequate transportation system.

Viewed in its entirety, the Olympia impact fee system is designed to secure an acceptable LOS for its transportation system into the future. The system accomplishes this by distributing the costs of system improvements which are made necessary by new development in each six-year period among that same development in that same time period. All new development subject to impact fees in each six-year period is charged in the same manner. This results in a proportionate impact fee meeting the requirements of RCW 82.02.050 (3).

V. Miscellaneous conclusions.

As described in the Findings, the City's method counts traffic crossing a roadway, as well as traffic on a roadway, in assessing the effect of traffic from a specific project on a roadway link. The Appellant has not met his burden of showing that this violates governing standards.

As described in the Findings, the City's method projected 1998 traffic based on transportation facilities actually in place at that time. The projection of 1998 traffic in the independent fee calculation assumed the improvements committed to be built within the following six years were also in place in 1998. The Appellant has not met his burden of showing that the City's method of projection violates governing standards.

As described in the Findings, the City would calculate the amount of impact fees by using the total project cost of the various improvements from the 1999 impact fee update ordinance, instead of the older cost numbers used by Mr. Drebick's independent fee calculation. OMC 15.06.040 D. states that "[i]mpact fees shall be assessed at the time the complete building permit or occupancy permit application is submitted for each unit in the development, using the impact

fee schedule then in effect." The impact fee schedule incorporates estimates of the cost of the various transportation improvements. At the time Mr. Drebick submitted a complete building permit application, the 1999 update had not been adopted. Therefore, the cost estimates from the 1999 update should not be used in calculating the Drebick impact fee.

VI. Fees and costs.

A Hearing Examiner does not have jurisdiction over claims brought under Chap. 64.40 RCW. Therefore, I lack any authority to award costs or fees under that statute as requested in Mr. Drebick's brief of September 17, 1999. (Ex. 1, Att. K.) If a Hearing Examiner possessed that authority, I would not award the costs or fees requested by the Appellant. The arguments and positions of the City did not remotely approach the level required for that sort of award. On the contrary, the arguments presented by the City, and those by Mr. Drebick, were the work of counsel operating at high levels of skill and professionalism.

DECISION

The Decision of the Director of May 7, 1999 on the independent fee calculation submitted by John Drebick is affirmed in part and reversed in part, as described below:

1. The Director's decision is affirmed on the issue of the time period over which the costs of new system improvements should be distributed. See Conclusions of Law, Part IV. The City's method of distributing the costs of system improvements which are made necessary by new development in each six-year period among that new development in that same time period is consistent with governing law.

2. The Director's decision is affirmed on the issue of which edition of the ITE Manual should be used to project the afternoon peak hour trips generated by the Drebick proposal.

See Conclusions of law, Part III. The City was correct to use the 5th Edition for the Drebick proposal.

3. The Director's decision is reversed on the issue of whether the Drebick impact fees comply with the relationship, proportionality and benefit requirements of RCW 82.02.050 (3). See Conclusions of Law, Part II. Those requirements describe the Legislature's view of fairness in assessing impact fees. The impact fees assessed the Drebick proposal do not comply with those requirements. Therefore, OMC 15.10.020 D. requires that the Drebick impact fees be adjusted based on principles of fairness to comply with the requirements of RCW 82.02.050 (3).

This decision holds that certain aspects of the impact fees imposed by the City on the Drebick proposal are inconsistent with statutory requirements. This decision also upholds the Director's rejection of the independent fee calculation submitted by Mr. Drebick on several grounds. Neither the fees imposed by the City nor the independent fee calculation submitted by Mr. Drebick may be affirmed. Therefore, this matter is remanded to the Director for adjustments to the Drebick impact fees in a manner consistent with this decision.

Dated this 2nd day of November, 2000

/s/ Thomas R. Bjorgen
Thomas R. Bjorgen
Hearing Examiner

Appendix F–1

FILED APR. 14, 2006

THE SUPREME COURT OF WASHINGTON

CITY OF OLYMPIA, a Washington code city,	)	
	)	MANDATE
Petitioner,	)	
	)	NO. 75270-2
v.	)	
	)	C/A No. 29018-9-II
JOHN DREBICK and JANE DOE DREBICK, husband and wife, d/b/a DREBICK INVESTMENTS,	)	Thurston County No. 00-2-02152-3
Respondents.	)	

THE STATE OF WASHINGTON TO:

The Superior Court of the State of Washington in and for Thurston County.

The opinion of the Supreme Court of the State of Washington filed on January 19, 2006, became final in the above entitled cause on April 13, 2006. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows: Costs in the amount of $1,064.15 are awarded in favor of Petitioner City of Olympia and against Respondents Drebick, et ux., et al. Order Denying Motion for Reconsideration was entered herein on April 13, 2006; copy attached.

SEAL OF THE SUPREME COURT STATE OF WASHINGTON

I have affixed the seal of the Supreme Court of the State of Washington and filed this Mandate this 14th day of April, 2006.

/s/ C. J. Merritt

C. J. MERRITT
Clerk of the Supreme Court, State of Washington

cc: Hon. Christine A. Pomeroy, Judge
Hon. Betty Gould, Clerk
Thurston County Superior Court
Hon. J. Dean Morgan, Judge
Hon. David Ponzoha, Clerk
Court of Appeals Division II
David John Lenci
Julie Anne Halter
Alexander Weal Mackie
Kristopher Ian Tefft
Bob C. Sterbank
John Edward Vanek
Russell Clayton Brooks
Robin L. Rivett
Jeffrey Scott Myers
Marilee Jones Scarbrough
Eric S. Merrifield
Samuel A. Rodabough
Reporter of Decisions

West's Revised Code of Washington Annotated Currentness
Title 82. Excise Taxes (Refs & Annos)
Chapter 82.02. General Provisions (Refs & Annos)

82.02.020. State preempts certain tax fields—Fees prohibited for the development of land or buildings—Voluntary payments by developers authorized—Limitations—Exceptions

Except only as expressly provided in chapters 67.28 and 82.14 RCW, the state preempts the field of imposing taxes upon retail sales of tangible personal property, the use of tangible personal property, parimutuel wagering authorized pursuant to RCW 67.16.060, conveyances, and cigarettes, and no county, town, or other municipal subdivision shall have the right to impose taxes of that nature. Except as provided in RCW 82.02.050 through 82.02.090, no county, city, town, or other municipal corporation shall impose any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of residential buildings, commercial buildings, industrial buildings, or on any other building or building space or appurtenance thereto, or on the development, subdivision, classification, or reclassification of land. However, this section does not preclude dedications of land or easements within the proposed development or plat which the county, city, town, or other municipal corporation can demonstrate are reasonably necessary as a direct result of the proposed development or plat to which the dedication of land or easement is to apply.

This section does not prohibit voluntary agreements with counties, cities, towns, or other municipal corporations that allow a payment in lieu of a dedication of land or to mitigate a direct impact that has been identified as a consequence of a proposed development, subdivision, or plat. A local government shall not use such voluntary agreements for local off-site transportation improvements within the geographic boundaries

of the area or areas covered by an adopted transportation program authorized by chapter 39.92 RCW. Any such voluntary agreement is subject to the following provisions:

(1) The payment shall be held in a reserve account and may only be expended to fund a capital improvement agreed upon by the parties to mitigate the identified, direct impact;

(2) The payment shall be expended in all cases within five years of collection; and

(3) Any payment not so expended shall be refunded with interest to be calculated from the original date the deposit was received by the county and at the same rate applied to tax refunds pursuant to RCW 84.69.100; however, if the payment is not expended within five years due to delay attributable to the developer, the payment shall be refunded without interest.

No county, city, town, or other municipal corporation shall require any payment as part of such a voluntary agreement which the county, city, town, or other municipal corporation cannot establish is reasonably necessary as a direct result of the proposed development or plat.

Nothing in this section prohibits cities, towns, counties, or other municipal corporations from collecting reasonable fees from an applicant for a permit or other governmental approval to cover the cost to the city, town, county, or other municipal corporation of processing applications, inspecting and reviewing plans, or preparing detailed statements required by chapter 43.21C RCW.

This section does not limit the existing authority of any county, city, town, or other municipal corporation to impose special assessments on property specifically benefitted thereby in the manner prescribed by law.

Nothing in this section prohibits counties, cities, or towns from imposing or permits counties, cities, or towns to impose

water, sewer, natural gas, drainage utility, and drainage system charges: PROVIDED, That no such charge shall exceed the proportionate share of such utility or system's capital costs which the county, city, or town can demonstrate are attributable to the property being charged: PROVIDED FURTHER, That these provisions shall not be interpreted to expand or contract any existing authority of counties, cities, or towns to impose such charges.

Nothing in this section prohibits a transportation benefit district from imposing fees or charges authorized in RCW 36.73.120 nor prohibits the legislative authority of a county, city, or town from approving the imposition of such fees within a transportation benefit district.

Nothing in this section prohibits counties, cities, or towns from imposing transportation impact fees authorized pursuant to chapter 39.92 RCW.

Nothing in this section prohibits counties, cities, or towns from requiring property owners to provide relocation assistance to tenants under RCW 59.18.440 and 59.18.450.

Nothing in this section limits the authority of counties, cities, or towns to implement programs consistent with section 2 of this act, nor to enforce agreements made pursuant to such programs.

This section does not apply to special purpose districts formed and acting pursuant to Titles 54, 57, or 87 RCW, nor is the authority conferred by these titles affected.

Appendix H–1

West's Revised Code of Washington Annotated Currentness
Title 82. Excise Taxes (Refs & Annos)
Chapter 82.02. General Provisions (Refs & Annos)

82.02.050. Impact fees—Intent—Limitations

(1) It is the intent of the legislature:

(a) To ensure that adequate facilities are available to serve new growth and development;

(b) To promote orderly growth and development by establishing standards by which counties, cities, and towns may require, by ordinance, that new growth and development pay a proportionate share of the cost of new facilities needed to serve new growth and development; and

(c) To ensure that impact fees are imposed through established procedures and criteria so that specific developments do not pay arbitrary fees or duplicative fees for the same impact.

(2) Counties, cities, and towns that are required or choose to plan under RCW 36.70A.040 are authorized to impose impact fees on development activity as part of the financing for public facilities, provided that the financing for system improvements to serve new development must provide for a balance between impact fees and other sources of public funds and cannot rely solely on impact fees.

(3) The impact fees:

(a) Shall only be imposed for system improvements that are reasonably related to the new development;

(b) Shall not exceed a proportionate share of the costs of system improvements that are reasonably related to the new development; and

(c) Shall be used for system improvements that will reasonably benefit the new development.

(4) Impact fees may be collected and spent only for the public facilities defined in RCW 82.02.090 which are addressed by a capital facilities plan element of a comprehensive land use plan adopted pursuant to the provisions of RCW 36.70A.070 or the provisions for comprehensive plan adoption contained in chapter 36.70, 35.63, or 35A.63 RCW. After the date a county, city, or town is required to adopt its development regulations under chapter 36.70A RCW, continued authorization to collect and expend impact fees shall be contingent on the county, city, or town adopting or revising a comprehensive plan in compliance with RCW 36.70A.070, and on the capital facilities plan identifying:

(a) Deficiencies in public facilities serving existing development and the means by which existing deficiencies will be eliminated within a reasonable period of time;

(b) Additional demands placed on existing public facilities by new development; and

(c) Additional public facility improvements required to serve new development.

If the capital facilities plan of the county, city, or town is complete other than for the inclusion of those elements which are the responsibility of a special district, the county, city, or town may impose impact fees to address those public facility needs for which the county, city, or town is responsible.